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VOL. III.

In the *SAVOY*:

Printed by J. Nutt, Assignee of *Edward Sayer* Esq; for J. Walthoe in the *Middle-Temple* Cloisters, and J. Walthoe *Jun.* against the *Royal Exchange* in *Cornhill*, 1716.

THE Earl of *Oxford's* CASE IN *CHANCERY.*

With the Lord Chancellor's Arguments, touching the Jurisdiction of the said Court. *Mich.* 13. *Jac.* 1. *B. L. at Law* 11. *Co.* 66. *B. N.*

Jurisdict.ⁿ of Ch. Chancd. vide Jeffs Case 1. Roll. 525. — 1. Lev. 142. 12. Co. 113. — 1. Ro. Ab. 372 — 3 Vl. 3. Inst. 123. — 4. Inst. 96. 92. Dy. Abr. 130. 131.

Magdalen College, 39 *H.* 8. seized in Fee of the Rectory of *Christ's Church*, and the *Covent Garden*, without *Aldgate*, *London*, containing 7 Acres, demised them for 72 Years, rendring 40 *l.* *per Ann.* for the Rectory, and 9 *l.* for the Garden. And 17 *Eliz.* (50 Years of the said Lease being expired) the Q. at the Suit of the said College licenced them to alien, which they did, and then received for the Rectory 25 *l.* *per Ann.* and 15 *l.* for the Garden. It being Her Majesties Intent, That the College should be advanced greatly in Profit, by having the Rectory to them and their Successors dis-

charged of the Leaſe for Years, which in preſent was worth to them but 50 *l. per Ann.* the utmoſt Rent; the ſame was accordingly performed, by a Conveyance to Her Majeſty, and from Her Majeſty to *Spinola* and the Rectory, from *Spinola* to the College, after which *Spinola* and the Earl of *Oxford* his Aſſignee, and his Under-Tenants, have built upon the Garden 130 Houſes, and therein beſtow'd 10000 *l.* which Aſſignee and his Under-Tenants have Bonds and Security given for the Enjoyment thereof, to the Sum of 20000 *l.*

See 2. Atk. 83.

Note, The College is hereby advanced 1700 *l.* more than they ſhould have been if the former Leaſe had continued, which is not yet expired.

This Conveyance having been in Peace 40 Years, and thus advanced by the Purchaſers from a Thing of little Value to a great and conſiderable one; and it being a general Caſe wherein Perſons of all Degrees and Callings have made Purchaſes, they reſting ſecure on its paſſing through the Crown, the greateſt Protection.

See the report of this Case at Law in 11. Co. 66. b. by the name of Magdalen College Case.

The preſent Maſter of the College having by undue means obtained the Poſſeſſion of one of the 130 Houſes, whereof one *Caſtillion* was Leſſee, who being ſecure of his Title both in Law and Equity,

ty, ſealed a Leaſe thereof for 3 Years to one *Warren*, who thereupon brought an Ejectment againſt one *John Smith*, for Tryal of the Title in *B. R.* wherein a ſpecial Verdict was had; and while that depended in Argument the Leaſe ended, and ſo no Poſſeſſion could be awarded for the Plaintiff, nor Fruit had of his Suit.

If it had not been so, there could have been no advantage to plt, because court's judgment was agt him.

Yet he proceeded to have the Opinion of the Judges to know the Law, (which was a voluntary Act of his) to the Intent, if the Law were with him, he might begin a New Suit at Law, and ſpare to proceed in Equity, and if the Law were againſt him, that then he might proceed in *Chancery*. And the Judges of that Court having delivered their Opinions againſt his Title, before any Judgment entred upon the Roll, the Earl and Mr. *Wood*, for themſelves and their Leſſees preferred their Bill in *Chancery*; and then Judgment was entred, *Quod Querens nil capiat per Billam.*

To which Bill in *Chancery* the Defendant put in a Plea and Demurrer, alledging the Conveyance to be void by the Statute of 13 *Eliz.* and that they evicted one Houſe, Parcel of the Premiſſes by Judgment at Law; which Plea and Demurrer were referred by Order to Sir *John Tindal* and Mr. *Woolridge*, who reported,

 That

That they thought it fit the Cauſe ſhould proceed to hearing, notwithſtanding the Plea and Demurrer; and afterwards in Default of an Anſwer, an Attachment was awarded againſt the Defendants, whereupon they were attach'd and a *Cepi Corpus* returned, and by Order of the 22d of *October*, 13 *Jac.* 1. they were committed to the *Fleet* for their Contempts in refuſing to anſwer; and do now ſtand bound over to anſwer their Contempts, they ſtill refuſing to anſwer.

And now this Term it was argued, That the Defendants thus ſtanding in Contempt, *&c.* may be ſequeſtred until Anſwer.

1. The Law of God ſpeaks for the Plaintiff, *Deut.* 28.

2. And Equity and good Conſcience ſpeak wholly for him.

3. Nor does the Law of the Land ſpeak againſt him. But that and Equity ought to join Hand in Hand, in moderating and reſtraining all Extremities and Hardſhips.

By the Law of God, He that builds a Houſe ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof; and it was a Curſe upon the Wicked, that *they ſhould build Houſes and not dwell in them, and plant Vineyards and not gather the Grapes thereof*, Deut. 28. v. 30. And

no Contract good with. quid pro quo.

And yet here in this Case, such is the Conscience of the Doctor, the Defendant, That he would have the Houses, Gardens and Orchards, which he neither built nor planted: But the Chancellors have always corrected such corrupt Consciences, and caused them to render *quid pro quo*; for the Common Law it self will admit no Contract to be good without *quid pro quo*, or Land to pass without a valuable Consideration, and therefore Equity must see that a proportionable Satisfaction be made in this Case.

vide 1. Cha. Cas. 80. 121. 1 Vern. 309.

As in the Case of *Peterson* vers. *Hickman*, the Husband made a Lease of the Wife's Land, and the Lessee being ignorant of the defeasible Title built upon the Land, and was at great Charge therein; the Husband died, and the Wife avoided the Lease at Law, but was compelled in Equity to yield a Recompence for the building and bettering of the Land. For it was so much the more worth unto her: And whereseoever one hath a Benefit, the Law will compell him to give a Recompence, as if *Cestui que use*, sell the Land to one that hath no Notice of the Use, and dieth; by reason that he had the Benefit of the Sale, his Executors were ordered to answer the Value of the Land out of his Estate, as appeareth by a Judgment Roll of 34 *H.* 6.

1. Cha. Cas. 80. 121. 171. — 2. Cha. Cas. 5. 84. — 1 Vern. 30. — 309. — 2 Salk. 449. Abr. 131, 11.

And his Lordſhip the Plaintiff in this Caſe only deſires to be ſatisfied of the true Value of the New Building and Planting ſince the Conveyance, and convenient allowance for the Purchaſe.

vide 12. Co. 113. 4 Rol. Abr. 301. And Equity ſpeaks as the Law of God ſpeaks. But you would ſilence Equity.

Firſt, Becauſe you have a Judgment at Law.

Secondly, Becauſe that Judgment is upon a Statute Law.

To which I anſwer,

See Eq. Abr. 130. *Firſt*, As a Right in Law cannot die, *no more can Equity in* Chancery *die*, and therefore *nullus recedat a Cancellaria ſine remedio*, 4 *E.* 4. 11[a]. Therefore the *Chancery* is always open, and altho' the Term be adjourned the *Chancery* is not; for Conſcience and Equity is always ready to render to every one their Due, and 9 *E.* 4. 11[a]. The *Chancery* is only removeable at the Will of the King and Chancellor; and by 27 *E.* 3. 15. The Chancellor muſt give account to none but only to the King and Parliament.

The Cauſe why there is a *Chancery* is, for that Mens Actions are ſo divers and infinite, That it is impoſſible to make any general Law which may aptly meet with every particular Act, and not fail in ſome Circumſtances.

The Office of the Chancellor is to correct

rect Mens Conſciences for Frauds, breach of Truſts, Wrongs and Oppreſſions of what Nature ſoever they be, and to ſoften and mollifie the Extremity of the Law, which is called *Summum Jus*.

And for the Judgment, *&c.* Law and Equity are diſtinct, both in their Courts, their Judges, and the Rules of Juſtice; and yet they both aim at one and the ſame End, which is, *to do Right*; as Juſtice and Mercy, differ in their Effects and Operations, yet both join in the Manifeſtation of God's Glory.

But in this Caſe, upon the matter there is no Judgment, but only a Diſcontinuance of the Suit, which gives no Poſſeſſion; and although to proſecute Law and Equity together be a Vexation; yet voluntarily to attempt the Law in a doubtful Caſe, and after to reſort to Equity is neither ſtrange nor unreaſonable.

But take it as a Judgment to all Intents; then I anſwer,

That in this Caſe there is no Oppoſition to the Judgment, neither will the Truth or Juſtice of the Judgment be examined in this Court, nor any Circumſtance depending thereupon; but the ſame is juſtified and approved; and therefore a Judgment is no Let to examine it in Equity, ſo as all the Truth of the Judgment, *&c.* be (not) examined

No Poſſeſſion is eſtabliſhed by the King's Writ after that any Judgment is ſought to be Impeached; for when the Plaintiff by his Leſſee ſeeking Relief at the Common Law is barred, then is his time to ſeek Relief in *Chancery*, when the Common Law is againſt him, *Doctor* and *Student*, fol. 16. A Serjeant is ſworn to give Counſel according to Law, that is, according to the Law of God, the Law of Reaſon, and the Law of the Land; and upon both, the Laws of God and Reaſon, is grounded that Rule, *viz. To do as one would be done unto.*

And therefore where one is bound in an Obligation to pay Money, payeth it and takes no Acquittance, by the Common Law he ſhall be compelled to pay the Money again. But when it appeareth that the Plaintiff will recover at Law, the Serjeant may adviſe the Defendant to take a *Subpæna* in *Chancery*, notwithſtanding his Oath.

So 1 *H.* 7. 14. If he deliver an Acquittance without Seal, or the Money is paid within a ſhort Time after the Day, or if he loſe the Acquittance, if Judgment be had in any of theſe Caſes the Party may reſort to Equity, 22 *E.* 4. and 7 *H.* 7. 11.

Alſo, after Judgment in thoſe Caſes, if the Party have a Releaſe he may have an

Audita Querela, which is a Latin Bill
Equity, if the other Parties Conſci-
ce be ſo large as to demand a double
tisfaction. So if the Statute be entred
to by Dureſs, or Menace, though the
rty be in Execution, yet he may avoid
by Dureſs of Impriſonment, 15 *E.* 4.
tz. Nat. Bre. 104. *L.* 5. *Ed.* 4. *Audita*
uerela 27. And yet it is a Judgment up-
Record, and ſo of a Judgment by
onfeſſion, and Satisfaction acknowledg-
by a Letter of Attorney which is loſt,
cannot be produced.

And in the Caſe of *Harning* verſ. *Caſtor*,
ich. 3. *Jac.* in *B. R.* on an *Audita Que-*
a brought, *per Opinionem Curiæ*, If a
dgment be given upon an uſurious Con-
ct, and it is part of the Agreement to
ve a Judgment, the Defendant may
oid ſuch Judgment by an *Audita Querela*,
by a *Scire facias*, brought upon the
me.

So if a Judgment be had againſt an In-
nt by Covine, as if an Infant be invea-
ed to be Bail for one in any Court at
eſtminſter, he may have an *Audita Que-*
a to avoid the ſame, *Trin.* 7. *Jac. Mark-*
m verſ. *Turner*, and 8 *H.* 6. 10. So if
dgment be had by Covine or Colluſi-
againſt an Executor to defraud the
editors, if it be pleaded in Barr. the
ovine and Colluſion may be averr'd at
Law

Law by Replication, and the Judgment fruſtrated thereby, 3 *H.* 6. 36. And *Note*, Every outlawry is a Judgment, yet the Party may have Remedy in Conſcience againſt him that cauſed him to be outlawed without juſt Cauſe. *Doctor* and *Student, lib.* 2. *cap.* 21. 21 *H.* 7. 7. 9 *H.* 6. 20.

So if one neglect to enrol his Deed of Bargain and Sale, being his only Aſſurance, as in *Jaques* and *Huntley*'s Caſe in this Court, 13°. *Junij* 1599. and the Bargainor brings an *Ejectione firmæ* againſt him, and hath Judgment, the Bargainee may reſort to *Chancery*, and there be relieved if not for the Land, yet for the Money paid.

And in *Morgan* and *Parry*'s Caſe, *Paſch.* 27. *Eliz.* A Woman had an Eſtate in an Houſe for her Life diſpuniſhable of Waſt, and yet ſhe was enjoyned not to commit Waſt in the Houſe, contrary to the Caſe of *Lewis Boles*, Lib. 11. (*Quere, If not becauſe of the Prejudice to him in Remainder?*)

By all which Caſes it appeareth, That when a Judgment is obtained by Oppreſſion, Wrong and a hard Conſcience, the Chancellor will fruſtrate and ſet it aſide not for any Error or Defect in the Judgment, but for the hard Conſcience of the Party; and that in ſuch Caſes the Judge

So play the Chancellors; and that these e not within the Statute, 4 *H.* 4. *cap.* . Which is, *That after a Judgment given the Court of our Sovereign Lord the King, e Parties and their Heirs shall be in Peace, til the Judgment be undone by Attaint or rror.*

But *Secondly*, It is objected, That this a Judgment upon a Statute Law.

To which I answer, It has ever been e Endeavour of all Parliaments to meet ith the corrupt Consciences of Men as uch as might be, and to supply the efects of the Law therein, and if this ause were exhibited to the Parliament it ould soon be ordered and determined Equity; and the Lord Chancel- r is by his Place under his Majesty, supply that Power until it may be had, all Matters of *Meum* and *Tuum*, be- ween Party and Party; and the Lord hancellor doth not except to the Statute the Law, (Judgment) upon the Sta- te, but taketh himself bound to obey at Statute according to 8 *Ed.* 4. and the dgment thereupon may be Just, and the ollege in this Case may have a good itle in Law, and the Judgment yet stand- h in Force.

It seemeth by the Lord *Coke*'s Report, *l.* 118. in Dr. *Bonham*'s Case, That Sta- utes are not so sacred as that the Equity

of

of them may not be examined. For he ſaith, That in many Caſes the Common Law hath ſuch a Prerogative as that it can controul Acts of Parliament, and adjudge them void; as if they are againſt Common Right, or Reaſon, or Repugnant or Impoſſible to be performed, and for that he Vouches, 8 *E.* 3. 30. 33 *E.* 3. *Ceſſavit* 41. 42. *Nat. Brev.* 209. *Plowd.* 110. 27 *H.* 6. *Annuity* 41. 21 *Eliz. Rot.* 303. And yet our Books are, That the Acts and Statutes of Parliament ought to be reverſ'd by Parliament, (only) and not otherwiſe, *Bro. Tit. Error.* 65. *&c.* and 7 *H.* 6. 28. 21 *E* 4. 46. 29 *E.* 3. 24. and upon that Reaſon the Lord Chancellor ſince the Device of the Action, to be brought by Parſons upon the Statute of 2 *Ed.* 6. have enjoyned the ſtay thereof.

And the Judges themſelves do play the Chancellor's Parts, upon Statutes, making Conſtruction of them according to Equity, varying from the Rules and grounds of Law, and enlarging them, *pro bono publico*, againſt the Letter and Intent of the Makers, whereof our Books have many Hundreds of Caſes, 15 *H.* 7. and 14 *H.* 7. 14. 42 *E* 3. 6. &c. Will you then have Equity ſuppreſſed in all Caſes, where in a Judgment at Law, or upon a Statute is had?

The

The use of the Chancery has been in all ges to examine Equity in all Cases, sa- ing against the King's Prerogative, as 5 *H.* 6. 27. 11 *H* 4. 16. and Doctor nd Student, *lib.* 2. *chap.* 5. 16. then you ust have a special Statute to except the hancellor. For general Statutes do ex- nd to the particular Usages of all the reat Courts at *Westminster*, especially of e Chancery, and especially for Matters Equity.

In Chancery upon a Recognizance, a *pias* may be awarded, and the Prece- nts of that Court shall close up the louths of the Judges of the Common w, notwithstanding the Statute of *agna Charta, chap.* 29. *Quod nullus liber mo capiatur aut Imprisonetur nisi per legale dicium Parium suorum vel per Legem rræ.* And so it was adjudged in *Cle- nt Parson's* Case, 21 *Eliz.* in the *Ex- equer*, which you may see in 8. *Coke* 2. and 25 *Eliz.* in *Martin* and *Bye's* se, and in 7°. *Jac.* in *Com. Banco. High- 's* Case, and *Kilway's* Case vouched to adjudged, 9th *Co.* 29. *vide Doctor* and *dent* 306ª. and every Court at *West- ster*, ought to take notice of the Usa- s and Customs of the Rest of the Courts *Westminster*, which are as a Law to ose Courts, and of which the Common w takes notice, 2 *Co.* 53. 65. 503. 4. *E.* 4. 2.

The

The Statute of 5 *Eliz.* of Perjury di
recteth how Perjury ſhall be Puniſh'd
ſaving the Authority of the *Star Chamber*
yet for Perjury committed in *Chancery*
either in an Affidavit, or an Anſwer, &c
If ſuch Perjury appear to the Chancellor
the Party may be puniſhed according t
his Direction.

Alſo, No *Exchequer Man* hath Privi
lege againſt a *Subpœna*, for Matters be
tween Party and Party, where the King'
Intereſt cometh not in Queſtion, 20 *Eliz*
Cutts contra *Peter Goodwin & al'.* and ye
their Privilege hath ſeveral Statutes tha
give ſtrength thereunto; but the Uſ
and Precedents of the *Chancery* are no
altered by thoſe Laws.

And if a Statute Staple be extended
which by the Statute is a Judgment of i
ſelf, and the Execution thereof is directe
by the Statute; yet it hath been uſual i
all Ages to moderate the hard Conſcien
ces of the Conuzees, and if they hav
been ſatisfied with their Coſts and Da
mages, after the Rate of the full Valu
of the Land, the Land hath been diſ
charged by a Decree of Equity.

Thirdly, The Law of the Land ſpeak
not againſt this.

For by 9 *Ed.* 4. 15. The Chancellor ſit
in Chancery according to an abſolute an
uncontroulable Power, and is to judg
accord

ccording to that which is alledged and prov-
d; but the Judges of the Common Law, are
judge according to a ſtrict and ordinary (or
mited) Power.

As 7 *H.* 7. fo. 10. *A* had Lands extended to
m in antient Demeaſn upon a Statute Mer-
hant, *B* purchaſed the Lands, and had a Re-
overy by Sufferance in the Court of Antient
emeaſn with Voucher, and entred, and ou-
ed *A.* A brought a *Subpœna*, and it was
olden, That *A* could not falſifie the Recove-
at Law, and therefore he ſhould be reſtored
the Poſſeſſion, by the *Chancery*, for he had
t any Remedy by the Common Law.
here *Note*, That notwithſtanding a double
dgment, yet the Judges directed them to the
ancery.

And the Statute of 4 *H.* 4. *Chap.* 23. was ne-
r made nor intended to reſtrain the Power of
e *Chancery* in Matters of Equity, but to re-
ain the Chancellor and the Judges of the
ommon Law, only in Matters meerly deter-
inable by Law, in legal Proceedings, and not
Equitable, and that they ſhould be conſtant
d certain in their own Judgments, and not
ay Faſt and Looſe. For by 37 *H.* 6. 13. and
vers other Authorities; no writ of Error or
taint lieth when the Suit is by *Subpœna*, and
e Party only ſeeks to Equity for the Equity
his Cauſe.

And therefore Judgments by Default, Con-
ſion, *&c.* and not by Verdict, are not with-
this Law, ſo as to bind the Judges in their
gal Proceedings; as 5 *E.* 4. 38. In Debt up-
an Obligation againſt *A. B. C.* and *D.* Judg-
ent, by Default is had againſt *A.* and *B. C.*
emurrs, and *D.* pleads to Iſſue, and by the

Opi-

Opinion of the Judges a *superſedeas* was
warded, *& hoc cauſa Conſcientiæ*, for that t
Judgment was by Default.

In the next Place it is conſiderable, how f
the Statute of 27 *E.* 3. *cap.* 1. doth extend,
check the Power of the *Chancery* in this Ca
Now the proper Expoſition of this Statute
from thoſe Statutes that were the Foundati
thereof, and whereupon this Statute was bui
it being not introductive of new Law; But d
clarative *Antiquis Juris.*

The precedent Statutes which do explain th
Statute are 31 *E.* 1. made at *Carliſle*, 4 *Ed.*
c. 6. in Confirmation thereof, 25 *E.* 3. *cap.* 2
and 25 *E.* 2. *cap.* 1. of Proviſions of Benefic
theſe being in Time before 27 *E.* 3. a
38 *E.* 3. which comes after and recites t
Statute of 25 *E.* 3. and this Statute of 27 *E.*
and confirms them with Additions for furth
Remedies, they being all link'd together in o
Chain, which is further apparent by the R
citals in the Law, and by the Preamble the
of, which doth manifeſt the Minds of the La
makers, and do naturally explain the La
that they do all extend to Eccleſiaſtical Juri
ction and Conuzance, and not to Tempor
and the ſame is more apparent by other ſ
ſequent Laws in ſeveral Kings Reigns follo
ing.

But for the Temporal Courts, and the S
port of their Judgments, there are only t
Statutes, *viz. Weſtminſter*, 2 *cap.* 5. and 4 *H*
cap. 23. which are already anſwered.

Vide the Argument *for the Authority and J*
riſdiction of the Court of Chancery, *at the en*
this Vol. where theſe 2 *Statutes are explained.*

See whether is here referred to at the beginning of Vol. I.

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Strickland

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REPORTS AND CASES

Taken and adjudged in the

COURT of CHANCERY

In the REIGN of

King *CHARLES* II.

Bretton contra *Bretton*, 12 *Car.* 2.

Deviſe to younger Children, how to be conſtrued.

MONEY was bequeathed to younger Children, where there were divers Daughters and one Son, who was the Heir at Law, and a fair Inheritance, and yet was by Birth a younger Child: It was decreed, that he was not a younger Child within the Deviſe, and ſhould not take by it, he being Heir at Law.

Davis contra *Wakefield*, *Mich.* 13 *Car.* 2. 27 *Nov.* Mr. of the Rolls.

An Injunction into the Exchequer.

A Bill was exhibited in Chancery, and a Plea allowed to it; the Plaintiff declines that, and brings a new Bill in the Exchequer for the ſame Matter. Ordered, That the Plaintiff elect in which Court he will proceed; if he elect in the Exchequer, the Bill in Chancery is diſmiſt; if in Chancery, an Injunction is awarded to ſtay his Proceedings in the Exchequer, *niſi cauſa.*

Sir *Samuel Jones* and *William Jones*, Executors to Sir *William Jones*, contra *Bradſhaw*, *Eaſter* Term, in Court, 13 *Car.* 2.

MAry *Cotton* bequeathed 500 *l.* to one *Dormer*, and made the Teſtator her Executor, and died; and he ſold Lands of his to the Plaintiff Sir *Samuel*, and left 500 *l.* of the Purchaſe Money in Sir *Samuel*'s Hands, who gave Bond to the Teſtator in his own Name for it: The Teſtator made his Will, and the Plaintiffs Executors, and died; they inventoried the 500 *l.* as part of the Teſtator's Eſtate; afterwards *Dormer* obtained a Decree againſt the Plaintiff for 500 *l.* upon this Equity, that that 500 *l.* was left in

in Sir *Samuel*'s Hands with Intereſt, and upon Truſt that he ſhould pay it to *Dormer*, the Court declaring that it was not Aſſets of Sir *William Jones*'s Eſtate: Afterwards the Defendant *Bradſhaw* brought an Action againſt the Plaintiffs on a Bond of their Teſtator, and the Plaintiffs not having Aſſets in reſpect of the 500 *l.* upon *Dormer*'s Decree, and that Decree and Payment upon it not being pleadable or to be given in Evidence at Law, thereupon the Plaintiffs exhibit their Bill here againſt the Defendant, ſetting forth the Caſe *ut ſupra*: And the Queſtion was, Whether the Plaintiffs ſhould have Allowance for the payment of the 500 *l.* againſt the now Defendant: And it was decreed they ſhould, and that the Matter ſhould go to an Accompt, and the 500 *l.* ſo paid to be allowed the Plaintiffs on Accompt. And Sir *John Maynard* ſaid, That if a Man ſhould ſell his Land and leave part of the Purchaſe-Money in the Purchaſer's Hands, and gives or appoints his Money to be paid to a Stranger, and after makes his Will, the Stranger ſhall have the Money, and it ſhall not be Aſſets. *Vide Hob.* 265.

Payment by Decree not pleadable at Law, is to be allowed by Decree.

Davie contra *Beverſham*, & *ux. Mich.* 13 *Car.* 2. Lord Chancellor and Mr. of the Rolls.

HEnry *Davie* agrees for the Purchaſe of certain Copyhold Lands which were ſurrendred out of Court to his Loſs; but before admittance dies, having other Copyholds; And having made his Will after the ſaid Contract, and thereby deviſed to the Plaintiff, who was then at his Death his viſible Heir, all his Copyhold, after his Death, his Wife being *privement Enſient*, after his Death is delivered of the Plaintiff's Wife, who then becomes the Heir to the Deviſor; the Plaintiff, taking it for granted that the Copyholds, ſo contracted for, did not paſs by the Will, ſuffered the Heir to be admitted thereunto, and the Son of the Heir for 20 Years, and paid her the Rent for that time, and had agreed ſo to do ſo long as he ſhould hold them: But afterwards Differences ariſing between the Heir and him about other Matters, the Plaintiff exhibited his Bill (*inter alia*) to have theſe Copyholds decreed to him; and upon the Hearing, it was declared by the Court, That it was clear the ſaid Copyholds, ſo agreed for, did paſs by the Will to the Plaintiff, for that the Purchaſer

Lands contracted for, let paſs by Deviſe of the Purchaſers.

haſer had by the Contract only an E-uity to recover the Land, and the Ven-or ſtood truſted for the Purchaſer, and as e ſhould appoint, till a Conveyance exe-uted: And the Caſe of the Lady *Fohamb* 651, was cited, where it was ruled, that upon Articles for a Purchaſe, the Pur-haſer dieth and deviſeth the Lands be-re the Conveyance executed, the Lands o paſs in Equity; but in the principal Caſe, aſmuch as the Plaintiff had admitted e Title to be in the Plaintiff, and paid r Rent, and agreed ſo to do; the Court ould not decree, but declared, If the laintiff had come in time, it was pro-r to decree.

Vendor after Contract for Purchaſe, ſtands Truſtee for Vendee.

Hall contra *Higham*, *Hill.* 14 *Car.* 2.

THE Plaintiff's Bill is to be relie-ved againſt the Penalty of a Bond; nd it is ordered he ſhall pay Intereſt nd Coſts, which will extend unto the efendant's Coſts at Law, as well as in hancery. *Vide* Report, *Trin.* 1663.

Coſts given in general, ſhall be Coſts at Law and Chancery.

nonymus after *Trin.* 14 *Car.* 2. Lord Chan-cellor. Upon a Demurrer.

THE Bill was barely for diſcover of a Deed, the Defendant demurr' r that the Plaintiff had not made O-

according to the Courſe of the Court, that he had not the Deed. Serjeant *Glyn* for the Plaintiff inſiſted, That the Oath was not required by the Courſe of the Court in this Caſe; and he took this difference, That when the Bill alledgeth the want of a Deed, and ſeeketh to be relieved upon the Matter of that Deed by a Decree, there ſuch Oath is neceſſary; but where the Bill ſeeks no Decree, but barely to have the Defendant diſcover whether he hath ſuch Deed or no, or to have the Deed produced at a Trial, in this Caſe, the Plaintiff ought not to be put to his Oath; for it is not to be preſumed the Plaintiff would exhibit a Bill in either of the latter Caſes, if he had the Deed. *Note*, This difference was well approved by the Lord Chancellor, and thereupon the Demurrer over-ruled.

Where it behoveth the Plaintiff to made Oath of the want of a Deed, and where not.

Lady *Dacres* contra *Chute* and *Houghton*. *Paſ.* 15. *Car.* 2. Lord Chancellor, Maſter of the Rolls.

THE Plaintiff being a Widow, ſeiſed of a Jointure of 700 *l. per Annum*, and *Chute*, the Defendant's Father made ſuit to marry her, and ſhe conſenting, he before Marriage agreed with her by Deed in Writing, That it ſhould be lawful for her, or ſuch as ſhe ſhould appoint

oint during the Coverture, to receive nd diſpoſe of the Rents of her Jointure s ſhe pleaſed. This Deed was put into *Houghton*'s Hands, he being formerly the laintiff's Agent: Then the Plaintiff and Mr. *Chute* married, he having firſt agreed vith Truſtees of hers to ſettle her a Join- ure; and they lived together ten Years, uring all which Time, *Houghton* received he Rents of the ſaid Jointure of 700*l.* a ear, and conſtantly with the Approba- ion of the Plaintiff, accompted for and aid the ſame to Mr. *Chute* her Husband; nd the Plaintiff in all that Time never ppointed *Houghton* to receive the Rents or her, nor ever claimed any benefit by he Agreement left in *Houghton*'s Hands: ut at the ten Years end Mr. *Chute* dying, aving made the Defendant, his Son, his Executor, the Plaintiff exhibited her Bill o have an Accompt from *Houghton*, and harged 1000 *l.* to be reſting in his Hands, naccompted for, that was received in Mr. *Chute* her Husband's Life-time, and he made Title to the ſame by the ſaid Agreement before Marriage, made by Mr. *Chute* with herſelf. And upon hear- ng, the Cauſe *inter* Earl of *Suffolk* and *Greenvill* being cited, and urged in the Argument of the Defendant's Counſel, he Court declared, The aforeſaid Agree- ment before Marriage was immediately

Marriage determines an Agreement made by *Baron* with *Feme* before.

extinguiſh'd by the Marriage, and that the Plaintiff could not be relieved thereupon; but ordered *Houghton* to accompt before a Maſter, for what he had receiv'd after Mr. *Chute*'s Death.

Sir *Edward Heath* contra *Henley* and *Whitwick*, 21 *May*, 15 *Car.* 2. upon a Plea. Lord Chancellor and Juſtice *Wyndham*,

S. C. 1. Ch. Cas. 20

THE Plaintiff was Son and Executor of the late Chief Juſtice, who was made Chief Juſtice at *Oxon*, during the difference between the King and the Parliament, but never ſat as Chief Juſtice in *Weſtminſter hall.* And the Bill was to have an Accompt of Money received by the Defendants, being Prothonotaries of the King's-Bench; which all declared to belong to the ſaid Chief Juſtice, and what Moneys they by their Office ought to receive for the Chief Juſtice by an implied Truſt, *Virtute Officii.* The Defendant pleaded the Statute of Limitations, 21 *Jac.* And upon the arguing thereof, it was inſiſted by the Plaintiff's Counſel, That this Truſt was not within the ſaid Statute. And it was anſwered on the other ſide, That a Guardian was within the Statute, and he was a Truſtee; but were ordered to anſwer.

Money received upon an implied Truſt, not within the Statute of Limitations.

Roberts

Roberts contra *Wilks*, & *al. Paſ.* 15 *Car.* 2. Lord Chancellor.

THE Plaintiff exhibited his Bill, to which the Defendant put in an inſufficient Anſwer, and ſo delayed the Plaintiff, and then exhibited a Bill in the Exchequer, in the Nature of a croſs Suit, and poſted on that Cauſe there: Wherefore the Plaintiff here moved for an Injunction to ſtay Proceedings on the Bill in the Exchequer.

Injunction into the Exchequer.

Sir *George Benion* contra *Stone*, 23 *May*, 15 *Car.* 2. Lord Chancellor, Lord Chief Baron *Hale*, and Juſtice *Wyndham*.

A Houſe being purchaſed by Deed, inroll'd in Chancery, and 2000 *l.* paid by Sir *George Benion*, in the Name of his Son, then an Infant of 5 Years old; Sir *George*'s Eſtate being all expos'd to Sale by the Parliament for Delinquency, this Houſe was ſold as part of it by the Truſtees for Sale of Delinquents Eſtates, to one who ſold it to *Stone*. *Stone* afterwards gave 500 *l.* to Sir *George*'s Son, being then of Age, and Sir *George*'s Wife, to convey the Houſe to him, which they did for that Conſideration; and firſt made Oath before a Magiſtrate, that they were not

A preſumptive Truſt, whether it ſhall affect a Purchaſer.

not Truſtees for Sir *George*. Sir *George* exhibits his Bill to be relieved againſt *Stone*, and ſuggeſts a Truſt in his Son and Wife for him: And it was then inſiſted, that in reſpect of the Infancy of the Son, upon the Purchaſe made, and the Father's payment of the Purchaſe Money, and the Sale of the Houſe for Delinquency as Sir *George*'s, it ſhould be preſumed a Truſt for the Father, My Lord Chancellor inclined to decree it on this Point; but Sir *George*'s Counſel offering *Stone* the 500 *l.* again, Time was given to the Parties to conſider thereof; and if they did not agree, the Court declared they would adviſe with ſome Judges, and deliver their Opinion; for *Hale* and *Wyndham* declared it a Truſt, for which Sir *George* was relievable; but *Stone* accepting the offer of 500 *l.* it was decreed, he ſhould convey on payment of it.

Godſcall contra *Walker* & *Wall*, 11 *May*, 15 *Car.* 2.

Conſideration of Judgment in Debt examined in Chancery, being got from one newly come to Age.

THE Bill was to be reliev'd againſt ſeveral Judgments in Debt from Sir *John Godſcall*, an Infant; and by a Practice between the Defendants, *Walker* and *Gouldſmith*, and *Wall* the Attorney, and the Infant's Guardian, and drew into examination the reality of the Debt, for which the

the Judgments were, and how the ſame roſe; and decreed, That it be referred to a Maſter, to examine the real Conſideration in Money or Wares, for which the ſaid Judgments were had; and thereupon the Court declared further Order ſhould be taken.

Parry contra *Bowen*, 26 *June*, 15 *Car.* 2.
Lord Chancellor.

1. C. in tot. verbis 1. Cha. Cas. 23.

RESolved, that where a Perſon hath Power to leaſe for ten Years, and he leaſeth for twenty Years, that the Leaſe ſhall be good for ten Years in Equity, and ſaid to be ſo ſettled ſeveral Times in this Court.

A Leaſe for more Years than the Leſſor had Power, to be good for ſo many as he had Power.

Tew contra *Thackwell*, 31 *Oct.* 15 *Car.* 2.
Lord Chancellor.

1. C. 1. Cha. 2. 8.

THE Plaintiff was Leſſee of divers Lands, whereupon one entire Rent was reſerved: Afterwards the Inhabitants of the Town, where part of the Lands lay, claim Right of Common in part of the Lands ſo let; and upon Trial of their Right, are found to have Right of Common there. Now this Defendant imagining a Right of Common recovered, was not an Eviction of the Land in Law, becauſe the Soil was not recovered; and ſo

The Apportionment of Rent in Equity, where it cannot be at Law.

ſo no Apportionment of this Rent could be at Law; and therefore this Bill was to have the Rent apportioned in Equity: And Serjeant *Maynard* inſiſted, That ſuch Apportionment had frequently been here decreed. But in this Caſe it appeared, that notwithſtanding the Right of Common, the Lands were worth the Rent reſerved and better; and therefore the Court would not Decree, but the Bill was diſmiſt.

Wollſtencroft contra *Long*, 6 *Nov.* 15 *Car.* 2. Lord Chancellor.

Debts on Bonds and ſimple Contract, and Legacies being charged on Lands, to be paid in equal proportion.

DEbtor upon Bonds and ſimple Contract makes a Conveyance of Lands upon Truſt, to ſell for payment of his Debts, It was declared to be the conſtant Practice, and ſo ruled and decreed here, That all the Debts ſhould be paid in proportion: And that if the Lands were not ſufficient to pay, all the Creditors ſhould loſe in proportion; and ſo it is where Lands are given to pay Debts and Legacies, they ſhall be paid in equal proportion, becauſe the Land is made liable to one as well as the other by the Debtor himſelf; but otherwiſe it is in Caſe of Debts on Judgment, that in their own Nature charge the Lands.

Baker

Baker contra *Beamont*, eodem die.

THE Defendant being brought into Court by *Habeas Corpus* directed to the Marſhal of the *Marſhalſea*, the Plaintiff informed, That the Defendant was formerly committed to the Fleet for breach of a Decree of this Court, by which he was to vacate a Judgment which he had againſt the Plaintiff, and turned himſelf over to the King's-Bench by an *habeas Corpus* in a feigned Action ſet up by himſelf; and thereby getting Liberty to go abroad, had taken the Plaintiff in Execution upon the ſaid Judgment, and clapt him in *Oxon* Gaol: And the Defendant now refuſing to diſcharge the ſaid Execution, Ordered, That the Defendant ſtand committed to the Fleet, and be confined to his Chamber; and an *habeas Corpus* was granted to the Plaintiff, whereby to remove him, which the Court declared ſhould be made of as long continuance as it could. *Habeas Corpus.*

Anonymus, Lord Chancellor, Maſter of the Rolls.

THE Bill was to have a Decree for an Incloſure upon an Agreement: It appearing by the Agreement, that there were by the Agreement to be 18 Allot-

ments, and but 15 Parties to the Suit. And ſo was objected by the Defendants, That all the Parties to the Agreement were not Parties to the Suit; and alſo that other Perſons claimed Common in the Ground to be incloſed, that were not Parties either to the Agreement or Suit; and that ſo to decree that Agreement would be to do a manifeſt Wrong, and be occaſion of Suits and Troubles.

Whereunto it was anſwered by the Plaintiff, That tho' there were 18 Sharers, ſome of the 15 were to have 2 Shares ſo as they made up the 18, and that there was another had Common, but by reaſon of Vicinage: But nothing of this alledged by the Plaintiff appeared.

Decreed nevertheleſs, That the Agreement for the Incloſure ſhould be performed; and a Commiſſion then was awarded to ſet out each Perſon's Lot; and the Court ſaid, That if there were any that were not Parties to the Agreement on Decree that had Intereſt, he could not be bound, and ſo as no prejudice: And however that it ſhould not be in the Power of one or two wilful Perſons to oppoſe a publick Good.

War

rd contra *Lake*, 12 *May*, 16 *Car.* 2. On a Demurrer, Lord Chancellor and Judge *Brown*.

THE Demurrer was to a *Subpœna*, in the Nature of a *Scire fac'*; and it s, becauſe he that brought the *Subpœna* not thereby alledge himſelf to be Heir Executor to him in the Decree. Re- ved, That there never was a Demurrer of s Nature before; and the *Subpœna* was Record, nor any where filed, and ſo to be demurred to, but the Cauſe to ſhewn at the Return of the Writ upon Order: And the Order mentioned n that brought the Writ to be both ir and Exeeutor; and this Demurrer was nceived very ridiculous and over-ruled.

Demurrer to a *Subpœna*, in Nature of a *ſcir' fac'*.

kſon contra *Eyre*, 23 *May*, 16 *Car.* 2. Lord Chancellor.

UPON a Motion, the Queſtion was, Whether on a Bill of Review, hereby Money was decreed back from Defendant to the Plaintiff, which the fendant had formerly gotten from the aintiff by a former Decree, the Plaintiff ould pay Damages for that Money: nd this having been formerly moved, rections were given to ſearch for Prece-

dents,

dents, whether Damages had been give on a Bill of Review, and no Precedent were now produced: And it was confi dently affirmed, there was no Preceden of any Damages or Coſts given on a Bi of Review; and compared it to a Judg ment in a Writ of Error, where the Judg ment is, That the Party ſhall recove *quicquid amiſit per judicium præd.* but n Damages or Coſts. And in this Caſe was ruled there ſhould be none.

Betton contra *Anne* 17 *July*, 16 *Car.* 2 Lord Chancellor; Maſter of the Rolls

A Leſſee of the Crown made an Un der-Leaſe at a Rent during the U ſurpation: The State avoided the fir Leſſee's Eſtate, and expoſed the Crown Intereſt to Sale. The Under-Leſſee ap plies to the Leſſor for Protection: H bids him ſhift for himſelf. The Unde Leſſee pays his Rent to the Purchaſer fo the State for ſome time: And after the Un der-Leſſee purchaſed his Tenement fro him that purchaſed from the State. Upo the King's Reſtoration, the firſt Leſſe brings Debt againſt his Under-Leſſee fo the Arrears of Rent from the Time h diſcontinued payment to him; and ha Judgment by default. And now to b relieved againſt the Judgment, whi

was by the Bill alledged to be by Surprize, tho' no Surprize appeared. The Under-Leſſee brought his Bill in Equity, tho' no Surprize was apprehended in obtaining the Judgment. And decreed, that the Judgment be vacated, for that the Rent was diſcharged by the Act of Oblivion, of which the Lord Chancellor ſaid a Court of Equity was as proper an Interpreter as the Judges at Law.

Juſtice Tyrrel *on a Plea and Demurrer.*

THE Bill was after a Verdict in an Action of the Caſe; And the Equity was, That the Defendant had Writ a Letter which the Plaintiff would not produce at the Trial, which would have diſcharged the Action, and ſet forth the Subſtance of it, and that the Matter lay only in the Defendant's Cognizance, and ſo ought to be anſwered; and that the Plaintiff's Witneſſes were beyond the Seas, *&c.* The Plea was of the Verdict, and that the Effect of the Letter was given in Evidence at the Trial, and the Demurrer was for want of Equity. On Debate whereof it was inſiſted, That there was not any Precedent of a Bill in the like Caſe after Verdict, but before Verdict it might be proper for a Diſcovery. Plea and Demurrer.

Peyton contra *Humphreys* was cited for the Plaintiff; but anſwered, That that was

Bill after Verdict in an Action of the Caſe on ſuggeſtion of a matter in Defendant's knowledge, which the Plaintiff could not prove at the Trial.

a Matter diſcovered after the Trial; but no ſuch Matter was here. And as to the Allegation of the Plaintiff's Witneſſes being beyond the Seas, that the Plaintiff could not have them at the Trial; it was anſwered, That upon an Affidavit of that at Law, the Court would have ſtaid the Trial, and this Caſe was referred to Precedents.

Proud contra *Combes*, 15 *Nov. Car.* 2.

Accompt ſtated under Hand and Seal, ſet aſide.

THE principal Caſe was now heard at the Rolls: The Original Bill was to be relieved againſt an Accompt ſtated between the Mortgagor and the Heir of the Mortgagee, under Hand and Seal upon ſuggeſtion that it was agreed upon ſealing, that if there were any miſtake in the Accompt, the ſame ſhould be reviewed and rectified; the Defendant denied the Agreement, and pleaded the Accompt ſtated, and three Meetings in order to it; and the ſame peruſed firſt by the Plaintiff and a Friend on his behalf, and then fully conſented to and ſealed: Iſſue was taken on this Plea, and the Plea proved; yet it appeared to the Court by the *quantum* of the Sum that the Accompt was made up of Intereſt upon Intereſt, and the Court raking the Agreement to be proved (howbeit it was not)

ot) decreed the Accompt ſtated to be ſet ide, and the Parties to go to an Ac-mpt *ab Origine.*

Obſerve the reaſon why the Review id not lye was, becauſe as the Decree as drawn up, there was no Error in .

Hayne contra *Hayne, & al'.* 29 *April* 17 *Car.* 2. Lord Chancellor.

DEnding the Suit after Replication and Iſſue joined, the Defendant got a eleaſe, and at the hearing of it brought Witneſs into Court *viva voce* to prove : It was inſiſted by the Plaintiff that is Releaſe could not now be read be-uſe the reallity of it could not be tri-, for it might be fraudulent or by ſur-rize. Then the Court offered a Trial at aw upon any ſuch Iſſue. In anſwer to at it was ſaid, That an Iſſue ought to e firſt joined in this Court upon the Point be tried, before the Court could di-ct a Trial; After a ſerious conſideration this Point at Bench and Barr, it was dered, The principal Cauſe ſhould ſtay, d a new Bill to be exhibited againſt e Releaſe, whereupon the Reality of it ight be examined and both Cauſes to heard together.

A Releaſe after Replication cannot be read at hearing, but is to be examined by a new Bill.

Poole contra *Pipe*, 1666. Lord Chancellor *Hyde*. 18 *Car.* 2.

An ancient Award performed by one Party, decreed.

THE Plaintiff had Land deſcended to him from his Brother who had bought it; but the Defendant brought an Ejectment upon a Leaſe for 500 Years, and an Award being made concerning the Title under which the Plaintiff claimed; and the Party that had the Leaſe had not performed, but kept the Leaſe, and it came to the Defendant; and the Bill is to hold the Land. And decreed, If it had been enjoyed under the Award, 14 *Jac.* and a perpetual Injunction againſt the Leaſe.

Deta & al'. contra *Dickinſon* 19 *Car.* 2. Lord Chancellor *Hyde*.

A Decree ordered to be new enrolled.

A Docket and Inrollment of a Decree loſt, and ordered to be new Inroll'd.

Owen contra *White* & al'. 6 *Nov.* 1667. Juſtice *Moreton* in Court.

A Deviſe of Mortgages to the Executors carries the Money due upon them from the Heirs, tho' forfeited in Fee.

THE Bill was preferred by a Mortgagor againſt the Heir of the Mortgagee and his Executors, to whom the Mortgagee had deviſed all his Mortgages, that he might pay his Money and

ave a Reconveyance; and the Defen-
lants interpleaded to whom he ſhould
ay his Money. and decreed, That the
Executors Deviſees ſhould have the
hole Money; and the Heir decreed to
oin in this Reconveyance, notwithſtand-
ng his Counſel inſiſted that they might
ave a proportion of Money, it not being
eviſed to the Executors and their Heirs
ot ever: But yet he was decreed to re-
onvey.

10 *Nov.* 1766. Lord Keeper *Bridgeman.*

UPON a Motion for an Injunction, for want of an Anſwer, upon Affidavit of a *Subpœna* ſerved upon Mr. *Otway* a Parliament-Man, after deliberate conſideration upon the ſaid Caſe, did grant an Injunction, but did order them not to enter an Attachment againſt them. Injunction againſt a Parliament-Man, upon Affidavit of a *Subpœna* ſerved.

But denyed to grant an Injunction for quieting Poſſeſſion of an Office, tho' Affidavit was made of three Years quiet Poſſeſſion, before the Bill exhibited. No Injunction to quiet Poſſeſſion of an Office.

If an Infant ſuffer a Decree againſt him by Conſent, he may at any Time reverſe it for that Error of his being an Infant; otherwiſe if he be Defendant, by an Adverſary Bill, and a Decree pronounced. Decree by conſent of an Infant at any Time reverſible, otherwiſe if not pronounced.

Wyndham contra *Wyndham*, Lord Keepe *Bridgeman*, and Juſtice *Twiſden*.

A Decree by conſent of a Perſonal Eſtate, binds a Purchaſer for valuable conſideration.

ORdered, that a Decree for a Lea and other perſonal Eſtate by co ſent ſhall bind Purchaſers for valuab conſideration, otherwiſe (ſaid the Lo Keeper) you will, like Gun-Powde blow up the whole Court of Chancery.

A Truſtee hath been examined as Witneſs. *Anthony Keck.*

Moyſer contra *Peacock* Hill', 1667. M ſter of the Rolls.

Bill for 3 *s.* 4 *d. per Annum* diſmiſt.

A Bill was to have 10 Groats a Ye and the Arrearages to be paid a pretended Rent, iſſuing out of Defe dants Houſes, but diſmiſſed at the hea ing for want of Equity.

Bill diſmiſt, and yet the Depoſitions to be uſed at a Trial.

Yet the Maſter of the Rolls ſaid a allowed the Plaintiff to uſe the Depo tions in this Cauſe at a Trial at Law, Caſe of the Death of the Witneſſes, th the Bill did not pray to perpetuate t Teſtimony.

No Decree *pro Confeſſo* till Appearance.

An Original Bill or Bill of Revivo if the Defendant hath not appeared, b ſtands out all Proceſs of contempt to Serjeant at Arms returned, no Decr can be had againſt him; or the Bill ta

en *pro Confeſſo*, unleſs he had appeared and ſtood in contempt for want of an Anſwer.

No Proceſs of Contempt is to be taken out againſt a Defendant for diſobedience of an Order, unleſs he be ſerved with a Writ of Execution of that Order, under the Seal of the Court.

No contempt of an Order, unleſs ſerved with a Writ of Execution of it.

Baker contra *Kellet*, 15 *Jan.* 19 *Car.* 2.
Lord Bridgeman.

THE Plaintiff's Bill is to diſcover the Defendant's Title to Lands of her Father's, and what they paid to buy in ſeveral Incumbrances chargeable thereon, and to have a Reconveyance on payment of ſo much as they paid for the ſame. The Defendant demurred, for that he ought not to take leſs than was due on the Incumbrances, and therefore demands Judgment; whether ſhall anſwer what he paid and allowed, becauſe the firſt Mortgagees were no Parties.

Mortgagor muſt pay what due on Incumbrances, and not what Aſſignee paid for them.

Savage per Guardian. contra *Whitebread*, 20 *Car.* 2.

An Infant not to be concluded by a ſlip in Counſel miſpleading.

SIR *Thomas Savage*, the Plaintiff's Father, ſold Land to the Defendant's Anceſtors, and covenanted that they were free of Incumbrances, and gave a collateral Security by other Lands alſo, and the Purchaſor having entered on the Security for dampnifications, the Bill was to have the collateral Security reconveyed; whereto the Defendants having ſet forth divers Incumbrances on the purchaſed Lands, and (*inter alia*) a Leaſe of 21 Years of Parcel thereof, the Plaintiff replied generally; and at the hearing a Reconveyance was decreed on ſatisfaction of the dampnifications, and upon the Report the Plaintiffs excepted againſt the Leaſe, that it was no Incumbrance, becauſe they had proved the Purchaſor had notice of it at the Time of the Purchaſe; whereto the Deſendants inſiſted that the notice was not in Iſſue in the Caſe: Yet Lord Keeper *Bridgeman* would not conclude the Infant by a ſlip of her Counſel in not putting it in Iſſue upon the Replication, but ordered a Trial whether the Purchaſor agreed to take the Lands charged with that Leaſe,

Hill

Hill. 20 & 21. *Car.* 2.

THE Bill is to be relieved againſt an Action brought by the Defendant againſt the Plaintiff as Executor, for Money due ro the Defendant upon a Trade between the Teſtator and him; and charges that the Defendant was in the Teſtator's Debt, and prays a diſcovery of the Truth: The Defendant pleaded that the differences being referred to Arbitrators by the Teſtator and him, he gave the Teſtator an Accompt whereon reſted due 164*l.* 17*s.* 2*d.* and no end being made, he had ſued the Plaintiff, the Executor, and obtained a Verdict for 100*l.* Damages beſides Coſts, and ſays he is adviſed ſuch Bill is to be admitted before a Trial, and not after a Verdict, and only Damages recovered, and that Judgment is ſince entered: But the Plaintiff on a Petition got an Order, that the Bill ſhall be taken as filed before the Trial and the Plea be ſet aſide; but that the Defendant may plead, anſwer or demur *de novo.* The Defendant pleaded the ſaid Matter again, and that he had no notice of the Bill, nor was ſerved with a Proceſs till after the Verdict; nor that the Bill was filed before the Verdict, yet muſt anſwer.

A Bill ordered to be be taken as filed before a Trial upon an Action of Debt on Accompt, and ſo ſet aſide.

A Plea of a Verdict for Damages.

Pitt

Pitt contra *Scarlet*, *Trin.* 20. *Car.* 2.

Obligee may sue in Chancery to discover Assets, before a *Plene Administravit* pleaded.

THE Plaintiff brought a Bill to b relieved as Obligee in a Bond against the Defendant as Executor of th Obligors, and to discover Assets for pay ment; the Defendant demurrs for tha the Plaintiff had brought no Action a Law against him, whereto the Defen dant had pleaded *Plene Administravit.*

Booth contra *Sanky*, *Mich.* 20. *Car.* 2. & *Trin.* 21. *Car.* 2.

THat the Plaintiff was indebted unt the Defendant, and one *Brown* was indebted to the Plaintiff: *Brown* gave a Judgment to the Defendant fo the Debt, and the Plaintiff gave Bond t pay it if *Browne* did not; and to have u the Bond upon a Promise of the Defen dant's, that if the Plaintiff would at hi charge extend *Browne*'s Land, he woul deliver up the Bond, was the Bill; th Defendant denied the Promise, but up on a Verdict that he did make such Pro mise and Proof of the extent, the Bon was decreed to be delivered up altho *Browne* failed in his Verdict.

Devering contra *Cooper*, 13 *April* 20 *Car.* 2.

AN Enrollment of a Decree in 10 *Car.* 1. being loſt, the Counſel after ſo long Time ordered to be reheard.

A Cauſe heard after 30 Years, the Inrollment being loſt.

Labyne contra *Alley*, 22 *Feb.* 20 *Car.* 2.

A Decree made and ordered, that if the Defendant died before *Eaſter*, yet that the Plaintiff may afterwards enroll it.

A Decree ordered to be enrolled, if a Party died before *Eaſter*.

Hilliard contra *Leiceſter*, *Trin.* 21 *Car.* 2. Baron *Turner*.

THE Plaintiff's Wife being the Daughter of one *Conſtable* and his Heir, ſhe married the Defendant's Father who is dead, and the Land being deſcended to her, ſhe and the Plaintiff brought a Bill, and alledged that the Defendant *Leiceſter* claimed ſome Eſtate in Reverſion after her Death, and had levied a Fine to the other Perſons who had brought a *Quid Juris Clamat* againſt her, and therefore prayed a Diſcovery of what Settlements were made, that he might know whether to plead an Eſtate in Fee or for Life to the *Quid Juris Clamat*, and to

Tenant for Life ſhall not have a diſcovery upon what Account a Fine is levied.

to what Uſes and to what conſiderations the Fine was levied: The Defendant demurred for that the Defendant had not ſufficient Title, whereby the Court could make a Decree as touching the Fine.

Voll contra *Smith*, *Mich.* 21 *Car.* 2. at the Rolls.

A Paroll Agreement 20 *s.* in Hand decreed.

THE Bill is, that the Plaintiff agreed with the Defendant, for the Purchaſe of a Houſe for 290 *l.* to be paid, and paid 20 *s.* in Hand and tendred the reſt at the Day. And relieved.

Bluck contra *Gore*, *Paſ.* 21. *Car.* 2.

A Purchaſor claims by the Bill by good Aſſurance and Conveyance, good without ſetting forth what.

THE Plaintiff alledges by the Bill that *M.W.* and *K.W.* by good and ſufficient Conveyance and Aſſurance in the Law, had granted to him and his Heirs their third Parts of the Premiſſes in queſtion, and prays Relief againſt the Defendant who was in Poſſeſſion by Mortgagee from an Anceſtor: The Defendant demurred for that the Plaintiff ſet not forth what kind of Conveyance or Aſſurances were made to him, or when executed, ſo as the Court might judge whether the Plaintiff had any Title; and therefore demanded Judgment and whether he ſhould be called to any Accompt for

or any profits, it appearing the Plaintiff was never in Poſſeſſion: And over-ruled.

Pyne contra *Matthew*, *Mich.* 21 *Car.* 2. at the Rolls, *No.* 24. 1669.

THE Plaintiff ſeized of three fourth Parts of the Farm of *Southbark Com' Devon'* and Counteſs of *Bath*, ſeized of the other Fourths, and ſhe lets her Parts to the Defendant for Lives or Years determinable on Lives, and he took the profits of all. A diviſion is decreed to be made by Commiſſioners during the Defendant's Term and Title.

A Diviſion made of Tenancy for Life or Joint-tenants.

Norcliff contra *Worſely*, *Mich.* 21 *Car.* 2. at the Rolls, 23 *Octob.* 1669.

THO. *Worſley* the Great-Grandfather 21 *Jac.* by Articles covenanted upon the Marriage of *Tho.* his Son the Grandfather, to ſettle Lands upon *Tho.* the Grandfather in Tail, and *Tho.* the Grandfather dying before the Great-Grandfather, leaving Iſſue *Tho.* the Father, before any Settlement made, *Tho.* the Father and his Mother, who was to have part of the Lands for her Jointure, exhibited a Bill againſt *Tho.* the Great-Grandfather to have ſuch Settlement, and it was decreed, 20 *Octob.* 15 C. 1.

Tho.

Tho. the Great-Granfather having co veyed away the Land, another Bill w brought againſt him and *John* his ſecon Son by *Tho.* the Father, and a Decre made the 18 *Feb.* 1651. that the Co veyance ſhould be made according to th Covenant; and that they ſhould accomp for the Profits to him, which were afte ſettled at 2304*l.* 14*s.* 4*d.*

That *Tho.* the Father having Iſſue *Tho.* the Son, afterwards married *Penelop* the Plaintiff's Wife, and *Tho.* the Fathe having Poſſeſſion without a Conveyance and dying left the ſaid *Penelope* his the Wife Executrix; and ſhe being marrie to the Plaintiff he claimed the 2304*l.* 14 4*d.* and 13 *July* 21 C. 1. obtained a Se queſtration againſt the Defendant to ſe queſter his Lands for the ſame, and had ſeqneſtred the ſaid intailed Lands, whic belonged to *Thomas* the Son, an Infant, a Iſſue in Tail, as the Eſtate of *John*, and diſturbed the Tenants, whereas the Plaintiff ought to have recourſe to *John's* peculiar Eſtate; *Tho.* the Son moved and prayed the Order for Sequeſtration might be diſcharged, whereupon the Court de clared the mean Profits was a perſonal Duty upon the Great-Grandfather, and *John* ought to be ſatisfied by them, and not out of the Lands decreed: Ordered unleſs Cauſe, and upon ſhewing Cauſe order

dered that the Sequeſtration extend not any of the Land decreed *per* Lord eeper *Bridgeman.*

anville contra *Jennings, Mich.* 21 *Car.* Juſtice *Rainsford.*

A Bond to a Marriage-broker good.

THE Bill was to be relieved againſt two Bonds, one given by the Plain-, and the other by his Wife to the De-dant; for that, the Defendant told the aintiff, That the Plaintiff's Wife (who s the Defendant's Kinſwoman) was a od Fortune, and that he would help her the Plaintiff for Wife; but that if he d, he muſt give the Defendant ſome-ing for his Pains: Whereupon he ſealed Bond to the Defendant of 400 *l.* penal- to pay 200 *l.* abſolutely. And then e Defendant went to the Woman, and on the ſame ground got another Bond m her for the like Sum; And that the uity was, That it was a Chowſe or aud, and that the Woman had nothing, r the Man had nothing neither.

But the Defendant proved, that the aintiff confeſſed, that he had 1200 *l.* th his Wife, and therefore that the nd given by him was good; but the oman being cheated, for that her Huſ-nd had nothing, but was a broken Mer-ant, her Bond was decreed to be deli-red up.

Borring-

Borrington contra *Borrington*, 14 *Nov.* 2 *Car.* 2. at the Rolls.

Deeds containing the Title of others not to be produced.

A Recovery was ſuffered by Tena in Tail, but defective as to mu of the Land for want of a good Tenant the *Præcipe*, it being out on Eſtates f Lives, and he that ſuffered the Recover deviſed the Lands to the Defendant a his Heirs, in Truſt to pay Debts and P tions: The Bill is by the Heirs at Law have the Counterparts of the Leaſe f Lives, in being at the time of the Recov ry, from the Defendant, to go to Law f the Title. The Defendant anſwered a confeſſed ſeveral Counterparts; but ſai He being a Purchaſor, hoped he ſhou not produce them to impeach his own T tle to enable the Plaintiff to go to La and he had brought the Counterparts i to Court, whereupon it was ordered th they be delivered back to him and t Plaintiffs to take what Remedy they c at Law; and if upon a Trial a Verd paſs for the Defendant, then to bri back ſuch as concern the Land re vered.

Pew contra *Cadmore*, 2 *Dec.* 21 *Car.* 2.

THE Plaintiff was an Adminiſtrator, and after a Decree pronounced died before Entry of the Order, and the Entry is ſuſpended by the Adminiſtrator *De bonis non*, &c.

Attorney General contra Sir *George Sands*, *Paſch.* 21 C. 2. in the Exchequer.

SIR *Ralph Freeman* purchaſed a Leaſe for Years of ſeveral Manors, and afterwards purchaſed the Inheritance there- in the Name of Sir *George Sands*, his Son in Law, in Truſt for Sir *Ralph* and his Heirs; and afterwards Sir *Ralph* made his Will, by which he appointed that both Mr. *Freeman*, whom he made his Executor, and Sir *George Sands* ſhould join to convey part to *Freeman Sands* and part to *George Sands*, (the two Sons of Sir *George Sands*) and to their Heirs, and the reſidue to all the Sons of Sir *George* by his then Lady Sir *Ralph*'s Daughter and their Heirs, who ſhould be living at the Time of the Death of Sir *Ralph*, and then died.

How Truſts to be forfeited.

Sir *George* had at the Time of Sir *Ralph*'s Death, only *Freeman* (who ſoon after died without iſſue) and *George Sands*,

but afterwards Sir *George*, had another Son called *Freeman*. Mr. *Freeman* the Executor refuſed the Executorſhip, whereupon Adminiſtration was granted to Sir *George Sands*; afterwards no Conveyance being made, either of the Leaſe or of the Reverſion of *George Sands*, by Sir *George* who had both in Truſt for Sir *George* according to the Will, *Freeman Sands* killed *George* his Brother, and afterwards was attainted for Murther. *Quære*, Whether any of theſe Truſts, either of the Leaſe for Years, or the Reverſion which was in Sir *George* in Truſt as aforeſaid, were forfeited by this Felony, to the King, or whom the Lands were holden, who by his Attorney ſued Sir *George Sands* in the Equity ſide of the Exchequer, to anſwer the Profits to the King, ſuppoſing the Truſt to be forfeited by the Felony.

The Caſe was ſeveral times argued at the Bar; and this Term Chief Baron *Hale* and Baron *Turner*, *Rainsford* being removed into the King's-Bench, and *Atkins* diſabled by Age, both argued that the Truſt was not forfeited.

Ceſtui que Truſt of Fee or Fee Tail, forfeits by Attainder for Treaſon.

In their Arguments 'twas agreed, That *ceſtui que Truſt* in Fee or Fee Tail, forfeits the ſame by Attainder of Treaſon, and the Eſtate to be executed to the King in a Court of Review by the Statute of 31 *H.* 8. 27 *H.* 8. 10.

2. An Alien *ceſtui que Truſt* of an Eſtate, e Truſt belongs to the King; and the hief Baron ſaid, It was the Opinion of e Judges in *Holland*'s Caſe, *Trin.* 23 *r.* 1. where the Chief Baron was of ounſel; for an Alien hath no capacity purchaſe but for the King's Uſe.

Truſt of an Alien Inheritance ſhall be for the King.

3. As to the King's Debt, by the ommon Law and the Practice of this ourt, which is part of the Common aw, *Ceſtui que Truſt* being indebted to the ing, the King ſhould have Execution of is Truſt: For before the Statutes 4 *H.* 7. 7 & 19) *H.* 7. 5. made in the Time of 7. 6. there be Precedents in the Court, hat the Writ of *Extendi facias* for the le- ying of the King's Debt was of the ebtor's Lands, or any other Land of hich any other Perſon was ſeized to s Uſe. And this was the Reaſon of Sir dward *Coke*'s Caſe, where the Intereſt the King's Debt did attach upon the ower of the King's Debtor, to revoke a ttlement by him made of the Eſtate, ſ. 4. *Jac.* 1. *Ford*'s Caſe: Certain Terms ere taken in Truſt for a Recuſant, and ld liable to the King's Debt of 20 *l.* a onth: So that where the King's Debt- hath the profitable part of the Eſtate, e King ſhall not loſe his Debt by any ction.

Truſts and Profits of an Eſtate in the King's Debtor, liable to the Debt.

Truſt of Inheritance not to be forfeited by Attainder of Felony to the Lord by Eſcheat.

4. 'Twas agreed, That the Truſt of the Reverſion could not be forfeited for Felony, which the Court held clear; and cited for Authority. 3. *Co.* Marqueſs of *Wincheſter*'s Caſe, 12 *Co.* 12. 5 *Ed.* 4. 2 *Cro.* 513, 33 *H.* 8. *cap.*—And if Inheritance 'tis not forfeited for Felony by Felons, appears by 27 *H* 8. *cap.* 10. and there is no Fine due to a Lord as long as he hath a Tenant: And therefore till the Statute 19 *H.* 7. *cap.* 15. the Lord could not ſeize the Lands of which his Villain was *Ceſtui que Uſe*; and if it be demanded what ſhould become of this Truſt, if *Ceſtui que Truſt* die without Heir? 'tis anſwered, The Land ſhall be diſcharged of this Truſt, as if Tenant in Fee of a Rent-charge dies without Heir, or be attainted of Felony, the Land is diſcharged.

Ceſtui que Truſt, but ſuch Truſt by Attainder is extinguiſhed.

5. If a Leaſe in Groſs, the Truſt thereof ſhall be forfeited for Felony or Outlawry in a perſonal Action; as the Earl of *Somerſet*'s Caſe, in *Hob. Daccomb*'s Caſe. *Cro. Babington*'s Caſe, and Sir *William Raleigh*'s Caſe. A Leaſe for Years, tho it be of never ſo long Continuance, if it be aſſigned in Truſt for *J. S.* and his Heirs, yet it ſhall go to his Executor; yet Truſts are ruled according to the ſtyle and courſe of Courts of Equity. A real Chattel in Law ſurvives to Husband

Truſt of a Chattel forfeited for Felony; not ſo, if the Truſt were to attend the Inheritance.

but

but not the Truſt of ſuch a real Chattel, *Co. Lit.* Chapter *Remitter*: So if a Man who is *Ceſtui que Truſt*, binds himſelf and his Heirs in a Bond, this Truſt is not Aſſets to the Heir, tho' ſince queſtioned in Lord Chancellor *Hyde*'s Time; but clearly the Truſt of a Leaſe for Years is Aſſets to charge an Executor in Equity: So a Truſt aſſigned over to wait the Inheritance, ſtill goes to the Heirs or Heirs of the Body, becauſe kept on Foot for ſpecial purpoſes; and this hath great reſemblance to the Caſe of Charters, which go with the Inheritance to the Heirs; but if granted over, the Parchment and Wax ſhall go to the Grantee and his Executors. 4 *H.* 7. 10. And in the preſent Caſe, no Truſt of a Chattel is forfeited to the King, becauſe the Leaſe for Years was not in *Freeman* who was attainted of Felony, nor the Truſt in him as a Chattel, for then he muſt have been Executor or Adminiſtrator to *George* the Son; and how was it Sir *Ralph*'s Intent the Leaſe and Inheritance ſhould be confounded and not kept ſeparate? And again, *Freeman* could have his Truſt but as Heir to *George*, and as long as he hath the Inheritance in him, and no longer, it ſhall go to the Heir as a *nomine pœnæ*, Patronage by Founderage, Charters, *&c.* and the Miſchief otherwiſe will be great, to have ſuch weighty Terms for-

See 3 Atk. 739.

No Truſt of a Chattel, forfeited by Attainder of Felony.

forfeited by Outlawry; and ſo Judgment was given againſt the King's Attorney.

Pary contra *Juxon*, *Paſ.* 21. *Car.* 2. Lord Keeper *Bridgeman.*

THE Bill was againſt the Defendant the Executor of the late Archbiſhop *Juxon*, and charged, That the Biſhop having the next Preſentation to the Maſterſhip of St. *Croſs*, did in his Life time direct Sir *William Juxon* his Executor, to give it Doctor *Pary*; and upon the Hearing, the Lord Keeper directed a Trial at the King's Bench Bar, whether it were in Truſt in Sir *William Juxon* or not. And at the Trial in the King's Bench, the Judge declared, A Truſt might ariſe by Parol and that the Executor might become Truſtee by the Will of the Teſtator, tho' nothing mentioned in the written Will, of what is proved in the Spiritual Court and the Verdict there was found for Doctor *Pary*.

A Truſt may ariſe by Parol.

Note, Dr. *Pary* being a Member of the Convocation, had his Privilege allowed him in this Suit, as a Privilege in Parliament. *Vide plus infra.*

A Member of the Convocation hath Privilege as a Parliament Man.

Nurſ

Nurſe contra *Guillim*, *Mich.* 1669. Lord Keeper *Bridgman.*

NUrſe was examined as Witneſs, tho' Plaintiff in the Caſe, to prove Service of the Decree; and upon debate, his Depoſition was allowed toward the proving the Defendant in Contempt, and then ruled, That the Plaintiff's Oath is ſufficient to convict the Defendant, unleſs the Defendant in his Examination ſwear clear contrary; and then the Defendant's Oath being againſt the Plaintiff's, it ſhall not convict the Defendant; and the Defendant in this Cauſe, upon Exceptions to the Maſter's Report, was found in Contempt.

A Plaintiff a good Witneſs to prove a Contempt.

A Plaintiff examined ſhall convict the Contemner, if he ſwear not clean contrary.

Backhouſe contra *Middleton*, *Hill.* 21 & 22 *Car.* 2. Lord Keeper *Bridgman.*

BAckhouſe being a Purchaſer, exhibited a Bill of Revivor againſt the Defendant, and revived the Suit by Order, and the Defendant joined in examining Witneſſes, and the Cauſe coming to be heard, the Bill was diſmiſſed, for that the Plaintiff as Purchaſer cannot maintain a Bill of Revivor, for that there wanted other Parties at the Hearing. And it was now moved on an Original Bill, exhibited

A Purchaſer can't revive.

by the Plaintiff, That he might uſe the Depoſitions taken in the Cauſe on the Bill of Revivor: But upon hearing of Counſel on both ſides, the Court denied thoſe Depoſitions to be uſed in the New Cauſe, becauſe in Truth there was no Cauſe depending; for the Bill of Revivor, being brought by a Purchaſer, was void; and ſo the Depoſitions were taken where there was no Bill and Anſwer depending, and conſequently no Indictment of Perjury could be brought againſt the Witneſſes.

Depoſitions taken on a Bill of Revivor diſmiſs'd, cannot be uſed on an Original Bill.

Dr. *Pary* contra *Juxon.*

IT hath been judged, where a Plaintiff and his Wife, in the right of the Wife, exhibited a Bill, and the Husband died, the Wife, if ſhe pleaſe, may proceed without a Bill of Revivor, ſo adjudged in the Commiſſioners time, *ex relatione Magiſtri Amhurſt*; and therefore Dr. *Pary*'s Wife went on, notwithſtanding the Death of her Husband.

Husband and Wife, Plaintiff in the Wife's Right, if the Huſband die, may proceed without Revivor by the Wife.

Seymour contra *Noſworthy*, *Mich. Hill.* 1669. 70. Lord Keeper *Bridgman.*

DEfendant pleaded himſelf a Purchaſer for a valuable Conſideration, but ruled not a good Plea, in regard he did not

A Plea of a Purchaſer for a valuable Conſideration muſt be from the Plaintiff's Anceſtors, or elſe not good.

ot plead himſelf a Purchaſer from ſome f the Plaintiff's Anceſtors, for a Purcha- r from a Stranger without Title, was eld no good Plea, and the Defendant as therefore ordered to anſwer.

Witham contra *Witham*, *Hill.* 22 *Car.* 2. 4 *May*, 1669. Maſter of the Rolls.

An Attachment for Words againſt the Court.

THE Plaintiff moved to commit the Defendant, fot that when the laintiff told him he came to ſerve him ith an Order from the Maſter of the olls; the Defendant ſaid, *The Maſter of e Rolls kiſs my Arſe*; but the Maſter of e Rolls only ordered an Attachment for e familiarity, but ſaid, He believed the ord Keeper would have committed him.

Gladwyn contra *Saville*, 20 *May* 1670. 22 *Car.* 2. Lord Keeper *Bridgman* and Juſtice *Wylde*.

THE Plaintiffs and Defendants are all Creditors of one *Steer* a Bankpt, who was a Lead-Merchant, and as found a Bankrupt the 19 *Jan.* 18 *Car.* by the Commiſſioners, and the Comiſſioners aſſigned the Eſtate to the Plainffs and others, in *October* 19 *Car.* 2. but e Defendants being in Poſſeſſion, the laintiffs brought Action of Ejectment, where-

wherein the Deeds (Debts) were dated i *February*, and *March* after *Steer* was found Bankrupt. The Plaintiffs in the Actio became Nonſuit, for the Defendants ha Verdicts and Judgments; ſo that in effec *Steer* was no Bankrupt in thoſe Convey ances, which made the Plaintiffs bring new Bill, to diſcover whether the Defen dant did not know at the time of th Deeds that *Steer* was a Bankrupt, and th Fraud of obtaining them, and to have ne Trials and a Commiſſion to perpetuat their Witneſſes Teſtimony: The Defen dants plead their Deeds and Verdicts and that *Steer* was really indebted to the at the times thereof, and demanded Judg ment, whether they ſhall diſcover any thi to weaken their Eſtates, or whether th Plaintiffs ſhall examine againſt them a Purchaſers; and upon long debate allow ed, That the Plaintiffs may at any tim bring any new Action.

Purchaſers after a Man found a Bankrupt, ſhall not in Equity diſcover any thing to weaken their Eſtate.

Barker contra *Eaſt*, 20 *Maii*, 1670. 2 *Car.* 2. Lord Keeper *Bridgman* and Ju ſtice *Wylde*.

THE Defendant brought an Actio of Trover in *Eaſter* Term 166 and the Record being brought down, th Wife withdrew it, and to prevent a Cha lenge the next Term, ſuggeſted upon th Ro

Roll, That one *Gladwyn*, who was *Ceſtui gue Truſt* to the Defendant, and a Creditor to *Steer* the Bankrupt, to whom the Defendant was Aſſignee, was Sheriff; whereupon a *Venire* was awarded to the Coroners, who all uſed to return the Writs; but *Wilkinſon*, one of the Coroners, being newly come to the Office, did not join in the Return of the Jury, the Defendant got a Verdict *ex parte*, ſuppoſing both Coroners had returned both *Venire* and *Diſtringas*; whereas *Wilkinſon* alone returned the Jury of indifferent Perſons, tho' he promiſed not to return the Writs alone, but to take *Fletcher*'s Advice, who had appointed a Meeting; yet *Wilkinſon* before the time appointed, returned the Jury; and *Fletcher* perceiving it, refuſed to ſign the Writs. And the Plainriff perceiving the Defendants could not have gone on, made no defence, the rather for that *Wilkinſon* perſwaded him to keep his Witneſſes at home, and afterwards returned the Writs in both Coroners Names; and ſo the Defendant obtained Verdict, which being a Perſonal Action, the Plainiffs cannot try again: And therefore bring a Bill, and ſeek to diſcover nothing criminal, but to have a new Trial, their Witneſſes being beyond Seas, or in Places remote. The Defendants demur for that *Wilkinſon's* pretended Miſdemeanor is

But Coroners Miſdemeanors in returning a Jury, no ground in Equity for a new Trial.

is examinable in the Court where the Action was brought, and not elſewhere; and that no Equity was ſhewn to induce a new Trial; and allowed.

Yeavely contra *Yeavely*: Lord Keeper *Bridgman*, *Lunæ* 19 *Maii*, *Anno Regni Car.* 2. *viceſimo ſecundo.*

Inter Jacobum Yeavely, Qr. & Ricum. Yeavely & al' Deft'.

THis Cauſe being this Day heard and debated upon a Bill of Review, brought by the ſaid Plaintiff to review and reverſe a Decree heretofore made iv two Cauſes, one wherein *Katherine Yeavely*, the Relict of *Thomas Yeavely* the deceaſed, an Attorney, was Plaintiff againſt *Anthony Yeavely*, the Plaintiff's Father, and Heir at Law to the ſaid *Thomas Yeavely* deceaſed, Defendant; and in the other whereof, the ſaid *Anthony Yeavely* the now Plaintiff's Father, was Plaintiff againſt the ſaid *Thomas Yeavely* the Attorney: And the ſcope of this Bill being That the ſaid *Thomas Yeavely*, the Plaintiff's Uncle deceaſed, being ſeiz'd in Fee of ſeveral Lands and Tenements in the Bill mentioned, of the value of 200 *l. per Annum*, 1 *Car. primi*, dying ſo ſeized, leaving the ſaid *Anthony Yeavely*, his Couſin and

and *Katherine* the Relict of the ſaid *Thomas*, the Plaintiff's great Uncle, together with the aſſiſtance of one *Thomas Yeavely* the Attorney, did ſet on foot a Will, ſuppoſed to be made by the ſaid *Thomas* the great Uncle, 17 Years before his Death, whereby the Premiſſes in Queſtion were ſettled on the ſaid *Katherine* for Life, the remainder on the ſaid *Thomas* the Attorney, and the Heirs Male of his Body, remainder over to other Perſons, and that the ſaid *Katherine* and *Thomas* the Attorney brought their Bill in this Court againſt the ſaid *Anthony*, the Heir of the ſaid Teſtator, to have the Deeds from him touching the Premiſſes; and the ſaid *Anthony* exhibited his Croſs Bill againſt them, ſuggeſting his Title as Heir at Law, and praying Examination of Evidences; in which Cauſe ſeveral Proceedings being had, and at laſt a Submiſſion of Parties, by the then Lord Keeper *Coventry*, being propoſed thereupon. In *Michaelmas* Term 1638; one Moiety of the Premiſſes was decreed to *Thomas* the Attorney and his Heirs, and the other Moiety to *Anthony* and his Heirs, unleſs a Tenure *in Capite* by Knights Service appeared by the end of the Term; In which caſe two third parts was to go to *Anthony* and his Heirs, and the other part to *Thomas* and his Heirs: And 14th *Dec.* 1638, tho' the

Tenure was inſiſted upon, yet a Decree paſſed for the Moieties; and yet the Plaintiff's Father petitioning againſt the ſigning and inrolling the Decree, the ſame was ſtay'd during the Life of the Lord *Coventry*; and the ſaid *Katherine* and *Anthony* died before the ſaid Decree was ſigned and inrolled: But the ſame was afterwards, by order of the Lord Keeper *Finch*, ſigned and inrolled; and that the Premiſſes decreed to *Thomas* the Attorney, are ſince by his Death, or otherwiſe, deſcended or come to the Defendants the *Yeavelys* and *German Buckſtone*, the ſaid *Buckſtone* pretending Title by Fine levied in *Mich.* Term 1653. And that the Plaintiff did ſhortly after the Attainment of his Age of 21 Years make his Entry and Claim into and upon the Premiſſes, and hath now brought his Bill of Review; and for Error contained in the Decree ſets forth, (amongſt other things,) That the Bill on which the Decree was founded, is only for Evidences touching the Premiſſes in Queſtion, and not for the Lands, and charged the Lands to be entailed; and yet the Decree doth decree the Lands themſelves, and an Eſtate in Fee ſimple: And for further Error, doth charge, That the Plaintiff *Katherine* died before the hearing of the Cauſe, and *Anthony* the Defendant, under whom the Plaintiff claims

laims, died before the Decree was ſign-
d and inrolled, and no Bill of Revivor
xhibited; and therefore to have the ſaid
Decree reviewed and reverſed, is the
cope of the Bill. And the Counſel for
he Defendant in this Bill of Review, ad-
nitting the Plaintiff's Entry and Claim;
nd that albeit the Plaintiff's Father were
ead before the Decree was ſigned and
nrolled, which nevertheleſs was not ad-
nitted, yet that the Plaintiffs ought not
o have any Relief nor the Decree rever-
ed; the ſame being made by ſubmiſſion
f Parties to the Lord *Coventry*, who af-
r hearing both ſides, the 13th of *Octob.*
638, decreed, That if *Anthony*, the Plain-
iff's Father, ſhould make appear a Tenure
n capite before the end of that Term, then
he Lands in queſtion to be divided into
hree parts; the Plaintiff's Father was to
ave two parts, and *Thomas Teavely*, the
ttorney, one third part; but if ſuch Te-
ure ſhould not be made appear, then the
and to be divided by Moieties, and the
laintiff's Father was to be diſcharged of
he Coſts: And tho' the Plaintiff's Fa-
her, the ſaid 14th of *December* 1638. ſtill
nſiſted upon the Tenure, yet the Decree
aſs'd for Moieties: And a diviſion was
fterwards made by Sir *Robert Rich*, then
ne of the Maſters of this Court, as ap-
ears by his Report of the 19th of *March*
1638;

1638; and the Decree not being yet com
pleated, and *Anthony* the Plaintiff's Fa
ther endeavouring to wave his ſubmiſſion
upon pretence that he had ſold a grea
part of the Premiſſes to *Aſhenhurſt* an
Bretland, another reference was mad
to Sir *Robert Rich*, to examine, whethe
the Purchaſer came in *pendente lite*, wh
certified the ſaid Purchaſes to be *pendent
lite*, and that they ought to be bound b
the Decree: Which Certificate the Lor
Coventry declared to be juſt, and 13th *De
cember* 1639, ordered the Decree to paſs
both againſt the Plaintiff's Father and a
gainſt *Aſhenhurſt* and *Bretland*, without fur
ther motion, unleſs Cauſe were ſhewed t
the contrary, the firſt Day of the nex
Term; before which time the Lord *Coven
try* died. And 8th *Febr.* 1639, no Cauſ
being ſhewed, tho' Notice given, the De
cree paſſed in the time of the Lord *Finch*
and was then ſigned and inrolled, an
both Parties have ſold away all or mo
part of the Lands divided to them: Bu
the Plaintiff's Counſel inſiſting, That hi
Father died in *January* before the ſignin
and inrolling the Decree, and that th
Decree was therein, as well as for othe
matters erroneous; upon debate thereo
and hearing what was alledged on eithe
ſide, his Lordſhip declared, That h
would not reverſe the ſaid Decree, othe
tha

han as to the ſigning and inrolling there-
f. And if the ſame ſhall be ſo far re-
erſed, the Defendants muſt be left to a
ew Bill or Bills of Revivor, as they ſhall
e adviſed, to enforce a performance of the
ecree. And upon reading the Proofs
ouching the time of the Death of the
laintiff's Father, the ſame appeared very
oubtful: It was therefore ordered, That
he ſaid Parties do proceed to a Trial on
his point at Law, Whether the ſaid *An-
ony*, the 8th of *February* 1639, the time
f ſigning and inrolling the Decree, was
ead or not? Which Trial is to be had at
he next Aſſizes to be holden for the
County of *Derby*; for which purpoſe the
aid Defendants are to appear *gratis*, name
n Attorney, and accept a Declaration,
nd plead to Iſſue; and the Sheriff of the
County was to attend the Prothonotary
ith the Books of Freeholders, who is to
eturn 48 Perſons, out of which each Par-
y is to ſtrike out 12, and the remaining
4 to be impannel'd as an indifferent Ju-
y to try the ſaid Iſſue: And after the
rial had, the Parties are to reſort back
o this Court for ſuch further Orders as
hall be juſt. And at the Trial, either Par-
y is at liberty to make uſe of the Depo-
tions taken in this Court, of ſuch Wit-
eſſes as are either dead, or being ſick,
r beyond Seas, cannot be brought to

Trial directed, whether a Defendant dead before a Decree inrolled after 31 Years.

the Trial; and in case the Parties do differ upon the Issue, then Sir *Mo. Brampston*, Knt. *&c.* is to direct the same. A Verdict was afterwards found, That the Plaintiff's Father was dead before the Decree inrolled, and a new Trial directed, *Mich.* 1670. *Vide fol.*

Bagg contra *Forster*, 22 *May*, *Car.* 2.

THE Bill being, That *James Bush* was seised of the Premisses in the Bill, a Treaty was had in *August* 1648 for a Marriage between him and *Dorcas* the Plaintiff's Mother; and before the Marriage, *August* 31. 1648, became bound to *Francis Goodwyn* and *Francis Holloway* Trustees nominated by *Dorcas* in 1000 *l.* that if he conveyed and assured the said Lands and Premisses to them and their Heirs within 2 Months after; or else if he and his Heirs purchased so much other Lands, as amounted to 100 *l. per Annum ultra* Reprizes, within three Months, and make the like Conveyances thereof, then the Bond to be void. And that afterwards the Marriage took effect; but *James* did not, as the Plaintiff can any ways discover, at any time convey the Premisses, or purchase other Lands: But yet after the Time mentioned in the Condition of the Bond, by Indenture dated 20th *Novemb.* 1648

1648. in conſideration of the Love he bore to the ſaid *Dorcas*, and other Conſiderations therein expreſſed, covenanted with the ſaid *Goodwyn*, That he and his Heirs, and all others, being then ſeiſed of the ſaid Premiſſes, ſhould from thence ſtand ſeiſed to the Uſe of himſelf for Life, without Impeachment of Waſte, and afterwards to *Dorcas* for Life, and after to the firſt and tenth Sons, and their Heirs Males, and after of his own right Heirs: And that after the Bond of Conveyance, *James* had iſſue by the ſaid *Dorcas* a Son, which died without iſſue; and afterwards *James* died without other iſſue, and *Dorcas* afterwards married the Plaintiff *Bagg*'s Father, and they had Iſſue, the Plaintiff, their only Son and Heir; and about two Years ſince *Dorcas* died, and the Plaintiff ought, according to the Agreement made upon the the ſaid Marriage, to enjoy the Premiſſes to him and his Heirs, in regard *James* died in *Dorcas* her Life-time without Iſſue, and he is Heir of *Dorcas*, and therefore ought to have an Execution of the ſaid Marriage-Agreement, according to the Condition of the ſaid Bond; and that the Defendants, in whom the Eſtate in point of Law is, may convey to him accordingly, is the ſcope of the Bill Whereto the Defendant *Forſter*, as to two third parts of the ſaid Premiſſes, hath pleaded,

That he is a Purchaſer for a good and valuable Conſideration, without notice of the ſaid Bond; and he and his Wife, who are intituled, as ſhe is Heir at Law, to the other part of the Premiſſes, have demurred, for that it appears of the Plaintiff's own ſhewing, that the Bond being entred into 1648, 22 Years ſince to *Goodwyn* and *Holloway*, Truſtees for the Plaintiff's Mother, that *James* in *November* following, by Indenture between him and the ſaid *Goodwyn*, made a Settlement of the ſame Premiſſes to himſelf for Life, and after to the Plaintiff's Mother for Life, and after to their firſt and other Sons in Tail, with remainder to his own right Heirs; and that there is no Iſſue of *James* and the Plaintiff's Mother living, but the Plaintiff a meer Stranger to *James*, and a Child of *Dorcas* by another Husband: Which Conveyance being ſo accepted as adviſed, ought reaſonably to be intended a performance of the ſaid pretended Agreement, and Condition of the pretended Bond and Agreement, at leaſt, that the Plaintiff ſhall have no relief in Equity; and for that *Goodwyn* the pretended Obligee in the Bond, nor the Executors nor Adminiſtrators of *James Buſhel*, for ought appears by the Bill, are made Parties either as Plaintiffs or as Defendants thereto; and for that no Title in Equity

appears in the Bill for the Plaintiff, therefore they demurr thereto. Upon debate whereof, and hearing what could be alledged on either ſide; it is ordered, That the ſaid Plea be allowed, but the Plaintiff may reply thereunto as he ſhall be adviſed; And as touching the ſaid Demurrer, the Court being aſſiſted by Mr. Juſtice *Wylde*, adjudged the ſame to be good and ſufficient; and the Plaintiff is to pay to the Defendant the ordinary Coſt of allowing a Demurrer, but with this Proviſo nevertheleſs, that the Plaintiff may be at liberty to amend his Bill, or to bring in any new Bill upon the ſaid Marriage-Agreement, as he ſhould be adviſed.

Moor contra *Morgan*, *Trin.* 1670. 22 *Car.* 2. Lord Keeper *Bridgman.*

THE Bill, as Executrix to Sir *Anthony Morgan*, is to have a Statute out of the Defendant's Hands for 8000 *l.* which the Defendant kept, being his Relict: The Defendant pleads, That the Statute was entred into in *Ireland*, and the Money defeazanced to be paid there, and that the Statute was there, and being an *Iriſh* Debt, and Sir *Anthony* dying without iſſue, the Defendant as his Relict, by the Cuſtom of *Ireland*, is intitled to a Moiety of it: Which Cuſtom cannot be determined

Cuſtoms in *Ireland* not allowed here.

mined in this Court as adviſed, and that ſhe had exhibited her Bill in *Ireland* to have the ſame: But the Plea was over-ruled.

Butler & al' contra *Coote & al'*. 26 *Octob.* 1670. 22 *Car.* 2. Lord Keeper *Bridgman.*

THE Plaintiffs, as Legatees, came to have an accompt of the Teſtator's Eſtate, the Defendants being Executors; and the Defendants ſubmit to the Court whether they may not pay their Legacies in the firſt place, and then there will want Aſſets to pay the Plaintiffs. Ordered That after Debts paid, all Legacies to be paid in proportion with Damages, ſo far as the Eſtate will extend: And not like the Caſe at Common Law, where the Executors pay their own Debts, and Legacies firſt, or him that firſt ſues, his whole Legacy before others.

Executors muſt not pay their own Legacies firſt, if not enough to pay all; for all muſt be in proportion.

Rawlins contra *Rawlins*, 8 *Dec.* 1670. 22 *Car.* 2. Mr. Juſtice *Tirrel.*

A Bill was to be relieved after an Action of Trover brought for Bonds the Plaintiff had cancell'd, tried and Judgment had thereupon; for that the Penalties of ſome were recovered, and other

others were paid, to which the Verdict and Judgment were pleaded and allowed; and 16 *Jan.* 1670. confirmed by the Lord Keeper *Bridgman*; only the Defendants muſt anſwer, Whether they know what the Jury gave their Verdicts upon, the Penalties or Money paid, and no further to proceed if they do not know and conſent; but afterwards ordered 13 *Decemb.* 1670, 22 C. 2. by Juſtice *Arthur*, that the laſt Order be diſcharged and the Plaintiff may reply.

A Verdict in Trover muſt not anſwer upon what ground the Jury went.

Prat contra *Allen.*

THE Bill was that the Plaintiff's Great-Great-Grandfather deviſed a Leaſe to the Plaintiff's Great-Grandfather and his Heirs, with a Proviſo to be void, unleſs he paid *Alice*, *Katherine*, and *Elizabeth*, three Daughters 40*l.* a peice at their Marriage; and in default of Payment, deviſed the Houſe to the Daughters and their Heirs.

The Plaintiff's Great-Grandfather being ſeized of a Cloſe worth 20*l. per Annum*, in 1602. dyed, and *Margaret* his Relict and *Nicholas* his Son, the Plaintiff's Grandfather, ſold the Houſe to *Gouning* in Fee, and for Security againſt the Legacies 6 *Nov.* 1702. deviſed the Cloſe for 500 Years, upon Proviſo that if *Marga-*

ret and *Nicholas* or his Heirs paid the Legacies, to be void: The Plaintiff's Grandfather paid one forty Pound to *Alice*, and before the other is due, *Katherine* and *Elizabeth* dyed leaving a Son two Years old, and *Katherine* a Daughter the Plaintiff's Mother 4 Years old; and *Margaret* leaving only an Eſtate for Life, and had no Perſonal Eſtate; the Cloſe was forfeited for Non-payment of the other two forty Pounds, and *Gouning* entred in 1615, and ever ſince enjoyed, and in 1626, the Cloſe came to the Defendant's Uncle who had Notice of the Mortgage, who about 1653, ſettled it on the Defendants.

That the Plaintiff's Uncle died within Age without Iſſue, and *Katherine* the Plaintiff's Mother, his Siſter and Heir, continued Covert till 1662. And the Bill is to redeem, and to have an Accompt of the Profits ſince the Plaintiff's Uncle's Death. The Defendant pleaded, anſwered and demurred and by Plea ſet forth a Purchaſe 1656, for 240*l.* by the Defendant's Uncle, of the Cloſe from *Gouning*, for the Remaindet of the five Hundred Years, and by Anſwer denied notice of the Mortgage.

An ancient Mortgagedemurr'd to the Redeemer; but Demurrer ſaved to the hearing.

And demurred, for that the Cloſe had been enjoy'd 60 Years under the Leaſe; and upon the Antiquity he ought not to ac-

ccompt. Arguments were 2. Why old Mortgages ought not to be redeemed.

1. Becauſe the Parties will be involved in long Accompts. but the Bill prays Accompt out of the Defendant's Receipts.

2. A power of Claim, which in this Caſe was not, for there was Infancy and Coverture till 1662.

And therefore the Plaintiff is to reply to the Plea and Anſwer, and the benefit of the Demurret is ſaved till the Hearing.

Gaſcoigne contra *Stut*, 20 *May*, 22 *Car.* 2. 1670, Lord Keeper *Bridgman.*

THE Bill was to have a Judgment vacated, whereupon a Leaſe was extended and ſold by the Sheriff to one *Parker*, in Truſt for the Defendant, the Conuzee of the Judgment, and to have the Bill of Sale ſet aſide, and an Accompt for the Profits ſince the Sale and Writ of Reſtitution of the Poſſeſſion, the Leaſe being alledged to be of far greater value than extended at.

A Leaſe ſold by the Sheriff, upon Execution of a Judgment, the Vendee muſt accompt for the overvalue.

The Defendant demurr'd, for that it is inconſiſtent with the Rules of Equity, after a Judgment executed by ſeizure of a Chattel Leaſe duly appraiſed and ſold by the She-

Sheriff, to diſpoſſeſs a real Purchaſer of what he hath purchaſed for valuable Conſiderations, upon a bare pretence, that it is of greater value than it was appraiſed and ſold by the Sheriff, who is no Party nor any offer by the Bill to reimburſe the Purchaſer what he is really out: All the Defendant by Anſwer denies tampering with the Sheriff to have the Lease ſold at an under-value: Whereupon it was ordered, That the Plaintiff reply to the Anſwer, notwithſtanding the Demurrer and proceed to Examination of Witneſſes and hearing the Cauſe, but no Coſts allowed. And upon the hearing before the Lord Keeper *Bridgman*, 5 *February* 167[1] a Decree was made to accompt and reconvey.

Hanbury contra *Walker & al'*. Lord *Bridgman* and Juſtice *Wylde*

Veneris die Decembr. 22 *Car.* 2.

Inter Joh'em Hanbury Ar' & Annam Mariam infant'. per prædict' Joh'em Hanbury, Ar' & prox' Amic' quer'. Theophilum Walker, & al' Defendentes.

THE matter upon the Plaintiffs Bill and Demurrer thereunto put in by the Defendant, coming this preſent Day

be argued before the Right Hon. the ord Keeper of the Great Seal of *Eng-nd*, aſſiſted by Mr. Juſtice *Wylde*, in the reſence of the Counſel learned on both des: The Scope of the Plaintiffs Bill be-ng as Grandfather and next Friend of the id Infant, to call the Defendant to ccompt for her Perſonal Eſtate, and he Rents and Profits of her real Eſtate: he ſaid Plaintiffs, by their Bill, charged he Eſtate real to be about 500 *l. per An-num*, and her perſonal Eſtate to be worth 000 *l.* and that the Defendant *Theophi-us Walker*, who claims to be Guardian to er the ſaid Infant, as great Uncle on the Mother's ſide, is a Batchelor that failed n his Eſtate, and is become Journey-man o another, and is a Perſon diſaffected to he Diſcipline of the Church of *England*, nd doth conceal the Plaintiff, the In-fant, from her ſaid Grandfather and his Wife, and endeavours to inſtruct her in his own Courſes to the diſlike of that Di-cipline; ſo that the Defendant *Walker* is not a fit Perſon to have the Education of the ſaid Infant, or the Management of her Eſtate; and the Infant is in danger to ſuffer much both in her Eſtate and Edu-cation by the Defendant, as ſhe is like to do by *Joſeph Hawkſworth* her former Guardian: Whereupon the ſaid Defen-dant for demurrer ſaith, That he by the

Law

Law of the Land hath the Right both to the Guardianſhip of the Infant during her Minority, he being the next of kin by the Mother's ſide, who hath no benefit by the Death of the ſaid *Anna Maria*; and that the ſaid *John Hanbury* having no right either to the Wardſhip or to the Infant's perſonal Eſtate, he cannot give the Defendant a Diſcharge; and therefore the Defendant conceives he ought not to be compelled to give any Accompt to him of the ſaid Infant's Eſtate. Upon the Debate of the Matter, and hearing what was alledged on either ſide, his Lordſhip declared, That this Court ought to take care of Infants, and their Education, and of their Eſtates, and to ſee the ſame preſerved and ſecured for them: and conceiving the Plaintiff, the Grandfather of the Infant, to be a good *Prochein Amy*, the Defendant being charged to be a mean and inſolvent Perſon, doth think fit, and ſo order, That the Defendant *Walker* ſhall anſwer to ſo much of the Plaintiffs Bill as demands an Accompt of the ſaid Infant's Eſtate, and where the ſaid Infant is, and how ſhe is bred, without Coſts; but this is to be without prejudice to the legal Intereſt the Defendant hath to the Cuſtody of the Infant and the Management of her Eſtate, and the Defendant may proceed in the Management of the

Guardian in Soccage ſhall not give Security to accompt, till a fault found in him.

e Infant's Eſtate, for the benefit of the fant as before. And 24 *February* 1670, e Defendant having anſwered and con-ſſed, That he had given over his Trade, d had a Salary from another, and that e Infant's Eſtate was 300 *l.* a Year,

The Court ordered him to accompt early, but ſaw no Cauſe, till a Default him, to make him give Security.

unt & Uxor contra *Jones*, *Trin. aut Mich.* 1670, *per* Lord Keeper.

THE Bill was to have a long Leaſe aſſigned, which came to the Plain-f by vertue of an Adminiſtration of r former Husband, but there were hildren of the Inteſtate; and it was re-rred to the Civil Law to determine e Adminiſtration before a Decree: For e Stat. of *H.* 8. is, That Adminiſtrati-be granted to the Wife or Child, and e Wife having it, ſend back to ſee if e Civil Law doth not proportion the dminiſtration.

Civil Law ſhall determine Adminiſtration between Mother and Child, before Equity will decree long Leaſes.

ead contra *Howet*, *Hill.* 1670, *per* Lord Keeper *Bridgman*, and Juſtice *Wylde*.

THE Caſe was, *Joſeph Warren* made a Leaſe to Truſtees, to the uſe of *dmund* the Son; which *Edmund* had Iſ-ſue,

But where no Iſſue, a long Leaſe decreed to the Wife, againſt her Husband's kindred.

ſue, *Edmund*, *Joſeph*, and *Jane*, the Le
came to young *Edmund*, who had marri
Read's Wife (her former Husband bei
dead) and he died without Iſſue, and ſ
is Adminiſtratrix. The Bill was to ha
the Truſtees aſſign to her, and is again
the Heirs of *Edmund*, and young *Edmu*
having left no Iſſue it was decreed a
cordingly.

1 *Chan.* Caſes 162. *March* contra *Lee*, *Mich.* 1670, Lo
Keeper and Judges, Chief Baron *H*
& al'.

THE Bill was to be let into *Drak*
Eſtate after prior Incumbranc
to the Defendant ſatisfied: But Defe
dant pleaded, That there were prior I
cumbrances of all the Plaintiffs claim
to the Defendant, and that the Defe
dant had a puiſne Incumbrance to t
Plaintiff of part of a Statute for collat
ral Security: And the Queſtion wa
Whether the Defendant ſhould hold a
both to ſatisfie the prior Incumbrance, an
what was his own Security, or only t
ſatisfy his own Money? and he having
Statute extended, it was by all adjudg
for the Defendant on a Demurrer.

Incumbrance prior, *meſne*, and *puiſne*, lies in prior, and ſhall hold till ſatisfied both.

Culla

llam contra *Dove*, 19 *Maii*, 22 *Car.* 2.

MOney after a Decree inrolled, certified due to the Executor of the aintiff; and upon Exceptions to the Report, they being no Party in Court, diſlowed: But theſe Precedents did not ſaſy; and thereupon the Bill is diſmiſſed, hleſs Cauſe.

illey contra *Egerton*, 27 *Octob.* 22 *Car.* 2. Lord Chancellor, Lord Chief [uſtice *Bridgman*.

NIC. *Tilley*, the Defendant's Father, being ſeiz'd in Fee of a Meſſuage, *c.* in *Com' Southton*, by Deed in 1642, ortgaged it to *Egerton* in Fee for Security f 150 *l.* with Intereſt: afterwards in the reſence of *Egerton*, the Plaintiff purchad the Premiſſes of *Nic. Tilley*, and paid im part of the Purchaſe-money in hand, nd gave Security for the reſidue; and 1651, the Plaintiff did agree with *gerton* for the Redemption and Purchaſe f the Premiſſes; and that in ſatisfaction hereof, the Plaintiff ſhould pay him 6 *l.* or ten Years, and then 120 *l.* at the ten Years end, the Premiſſes to be conveyed o the Plaintiff, and the Deeds to be delivered up to him; and upon the ſaid A-

Mortgagor agrees to convey his Equity of Redemption; but yet before the Agreement executed or Money paid, the Heir to have the Money, and not Adminiſtratrix,

greemeut, the Deed of Mortgage an other the Writings concerning the Premiſ ſes were delivered up by the mutual Co ſent of the Plaintiff and *John Egerton* t *Joſeph Collier* an Attorney, to draw the A greement into Writing, to the end might be ſealed by the Plaintiff and *Joh Egerton*: But before the Agreement wa drawn into Writing, *John Egerton*, 165 died, leaving the Defendant his Heir, an *Julian* his Wife, the other Defendant, too forth Letters of Adminiſtration; the Hei and Adminiſtratrix conteſted by their An ſwer, whoſe ſhould be the Money, th Bill being for an Interpleader; and i was decreed for the Heir. *Vide St. John* Executor to *Grobham*, againſt *Wareha* and others, touching the ſame Point de creed, 16 *Marc* 11 *Car.* 2.

L. C. Rep. Cha. Rep. 136.

Dolman contra *Pritman*, 1670, Maſter o the Rolls.

No Intereſt allowed in Chancery for Book-Debts.

LAnds being deviſed by Mr. *Houghto* to pay his Debts, the Plaintiffs wer the Creditors who brought their Bill a gainſt the Heir and Executor to have th Lands ſold, and had a Decree for th ſame: And now the Creditors by Book and ſimple Contract moved to have In tereſt for their Debts allowed by the Ma ſter, which had been ſtanding out twelv Years

Years, there being Eſtate enough to pay all: But the Court denied it, ſaying, Shopkeepers ſold at a price accordingly, when they were not paid in ready Money; But the Order was not entred.

An Executor is not bound to pay Legacies, without Security to refund, in caſe there be not ſufficient to pay Debts and all Legacies, *per Anth. Keck.*

Executor not bound to pay Legacies, without Security to refund, if not ſufficient to pay all.

If a Witneſs will not appear and be examined upon the retorn of a *ſubpœna*, the Party may take an Attachment againſt ſuch Witneſs; and if examined on the other ſide, ſuppreſs his Depoſition.

Attachment againſt a Witneſs if he will not appear, and ſuppreſs his Depoſition, if examined on the other ſide.

Lloyd Bar^t contra *Powis*, 19 *Jun.* 1671, Lord Keeper.

THE Plaintiff had brought a Bill againſt the Defendant's Father for Lands, and revived it againſt the Defendant as Heir, and afterwards diſmiſs'd it with Coſts: And the Queſtion was, Whether the Defendant ſhould have the Coſts expended by his Father before the Revivor? And ruled he could not, for they were dead with the Perſon.

A Bill of Revivor againſt a Defendant, as Heir, diſmiſs'd with Coſts, cannot be Coſts of the Original Suit.

Wright contra *Dorſet*, 24 *Jun.* 1671, Lord Keeper *Bridgman.*

No Revivor againſt Joint tenants.

LOrd Keeper declared, That if Joint-Tenants or Tenants in Common exhibited a Bill, and any of them died pending the Suit, there need no Revivor.

Cook contra *Delebere*, 24 *Julii* 1671, Lord Keeper *Bridgman.*

Certiorari Bill.

THE Plaintiff brought a *Certiorari* Bill, the Defendant pleaded a Decree in the Mayor's Court, and an inrollment, which was ſaid to be only pronuntial; and it was referred to a Maſter to certify, whether it was before the Bill.

Cutts contra *Pickering*, 4 *Maii* 1671, 23 *Car.* 2. Bar. *Turner.*

THE Defendant claimed an Eſtate by a Will for 90 Years, and after the Word *Years* was a Razure, where was thought to have been written, *if he ſo long live*: And the Queſtion was to know how to find out this Fraud and Alteration, and for that end the Plaintiffs had exhibited Interrogatories to examine Mr. *Joſeph Baker*, the Defendant's Solicitor upon; And Mr. *Baker* demurred, for that he

knew nothing, but as he was Solicitor for the Defendant, and as truſted by him; And demanded Judgment, whether he ſhould be examined againſt his Client? And the Demurrer coming now to be heard, it was over-ruled; and afterward the Defendant appealed to the Lord Keeper, who the 8th of *May* confirmed the Order.

A Sollicitor ordered to be examined againſt his Client.

Sir *Ralph Bovey* contra *Skipwith*, *Paſc.* 1671, Lord Keeper, *Wylde*, *Rainsford*, *Twiſden*, and *Wyndham*.

THE ſame Caſe, as the Security upon *Drake*'s Eſtate *ante*, but *Skipwith* had but a Judgment and not extended, and therefore could reach but a Moiety of what was in the prior Incumbrance, and not in *Skipwith*'s Security.

1 *Chan.* Caſes 201.

But this Caſe was harder, for *Skipwith*'s original Title was but to part of the Lands, and then he bought in precedent Incumbrances of all precedent to *Bovey*, who was before *Skipwith*: and yet *Skipwith* muſt hold all, till ſatisfied all due to him before *Bovey* came in. By the Opinion of the Lord Keeper, *Rainsford*, and *Wylde*, (*Twiſden* and *Wyndham* not concuring.)

The ſame.

Subſequent Incumbrances firſt ſatisfied.

And the whole Bar being of their Opinion, the inconvenience and miſchief of

the Caſe being much preſſed by Mr. *Keck*, who offered, That the firſt Incumbrance ſhould protect what *Skipwith* had a Title to originally againſt Sir *Ralph*, to ſatisfy what was due to him, but over-ruled *ut ante*, upon the Precedent of *Marſh* and *Lee*: And afterwards *Skipwith*'s original Security was recovered at Law againſt him by the Heir of *Drake*: ſo that he had no Title to buy the precedent Eſtates.

Higgins Except. Town of *Southampton Reſponſ.* 26 *Januarii* 1671, Lord Keeper, *Wylde*, and *Wyndham*.

Charitable uſes charg'd on Lands in *Capite*.

John Mill (whoſe Heir the Exceptant had married) in 1636, deviſed 37 *l. per Annum* to charitable Uſes, to be iſſuing out of his Manor of *Welſton*, whereupon a Decree was made and Exceptions (*int' al'*) that the Manor was held *in Capite*; and ſo but two parts to be charged, which would not ſatisfy the Bequeſt.

Quare, Whether more than two parts of Lands held *in capite*, may be charged by the Statute 43 *Eliz.*

And upon a long Argument, after ſeveral Caſes cited, as *Mountague*'s in *Cur. Ward.* one in *Jac. Temp.* and *Aiſcough*'s in *Croke*, 1302, 14 *Car.* 1. and others, the whole Court was clear of Opinion, That the whole were chargeable, for that the Statute

tute is an enabling Statute, and the Teſtator had only miſtaken the Conveyance; for had it been by a Grant, it had been good, and being by Will, they conceived the Statute did make good the Act of the Deviſor.

Pheaſant contra *Pheaſant*, 24 *Julii* 1671.
Lord Keeper *Bridgman*.

THE Plaintiff is Relict of Judge *Pheaſant*, who had brought a Writ of Dower of Lands, and recovered a third part of a Pepper-Corn, the Lands being purchaſed by the Judge, and an Aſſignment of a Leaſe for 1000 Years, made in Q. *Elizabeth*'s Time at a Pepper-Corn-Rent aſſigned to the Truſtees, and the Bill is to have her Dower in Equity, ſetting forth the Judgment in Dower; but that the Defendant ſets up the Leaſe, which was intended to wait on the Inheritance; for that Poſſeſſion never went with it; and that the Judge received the profits all along. To which the Defendant anſwered, That the Judge by his Will directed the Leaſe ſhould be kept ſeparate from the Inheritance to prevent Incumbrance or Dower, or both, as they believed, and demurred, That ſhe ought not to be relieved: whereupon Caſes were cited, as if the Inheritance had eſcheated, Dower.

ed, and that the Chancery ought not to relieve the Truſt: And *Box* and *Lane*, and *Bennet*'s Caſe, and *Robinſon* and *Fletcher*'s Caſe in 1653, where a Wife brought a Writ of Dower againſt the Heir, and a Conveyance was ſet up to a younger Brother; and the Court ordered the Deed to be given in Evidence, but would adviſe: And after ſeveral Arguments before Ch. Juſtice *Hale* and *Vaughan*, this Caſe was amicably compoſed, ſo no Judgment given in the Point.

Robinſon and *Fletcher*.

Stuckly contra *Cook* 24 *Julii* 1671, Lord Keeper *Bridgman*.

THE Bill was, That the Plaintiff bought of the Defendant a Cloſe for 1100 *l.* and paid part, and ſecured the reſt, and that the Defendant promiſed the Plaintiff's Wife, That if ſhe could procure a Releaſe of the Money from the Plaintiff, he would give her 20 *l.* and that a Releaſe was made, but that the Defendant denied to pay the 20 *l.* and the Plaintiff had no Witneſs, and to be relieved was the Bill. The Defendant demurred, That it was no Conſideration; for that the Debt was releaſed by Law, by Payment aud Security, and allowed.

20 *l.* promis'd a Wife to procure a Releaſe from her Husband, the Money being paid is *Nudum pactum*.

The Lord Keeper declared it *nudum pactum*, for that the Releaſe was no more than

than by Law and Conſcience ought to have been done.

Pureſoy contra *Jones*, 16 *Octob.* 1671, Lord Keeper *Bridgman.*

LOrd Keeper declared he would grant no Injunction to quiet poſſeſſion of an Office in another Court.

No Injunction to quiet poſſeſſion of an Office in another Court.

Knight contra *Bee*, 12 *Oct.* 1671, Lord Keepet *Bridgman.*

THE Plaintiff as Executor or Adminiſtrator, out of an inferior Dioceſe, came to be relieved for a Debt; the Defendant pleaded, That there was *bona notabilia*, ſo that the Plaintiff could give no Diſcharge, and allowed *ex parte*: But my Lord Keeper declared, he was not ſatisfied of the Law; but there being no Body for the Plaintiff, he would not defend it. And 2 of *November* following it was reheard before Judge *Archer*, who again allowed it.

Bona Notabilia a good Plea.

Digby contra *Cornwallis*, 4 *Dec.* 1671, Lord Keeper *Bridgman.*

Executor may be ſued both in Chancery for an Accompt, and alſo proceeded againſt in the Prerogative, and enforce an Inventory.

CEſtui que Truſt of a perſonal Eſtate may ſue in Chancery to have an Accompt againſt the Executor or Adminiſtrator, and at the ſame time ſue in the Prerogative-Court to enforce Executor or Adminiſtrator, to bring in an Inventory.

Tredcroft contra *White*, *Mich.* & *Hill.* 1671, Lord Keeper *Bridgman.*

Gratuities not to be proved.

RUled, That for gratuities given by a Steward, as in Marqueſs of *Winchester* and *Withers*'s Caſe, no proof to be of payment, but allowed upon the Parties Examination that he gave them, and he not to be examined to the particulars, nor to whom given. *Quære.*

An Allowance was made in a Report, notwithſtanding that part of the Order, which directs it, is omitted to be entred in the Regiſter Book.

And alſo in this Caſe, part of the Decretal Order (as it was ſigned and inrolled) was left out of the Entring Book in the Regiſter's Office, which directed an Allowance to the Defendant: And in reſpect of the ſaid omiſſion in the Order, the Maſter made not ſuch Allowance, but upon Exceptions to the Report the Allowance was made.

Yeavely contra *Yeavely* 30 *Feb.* 1971, Lord Keeper *Bridgman*, Lord Chief Juſtice *Hale*, Juſtice *Wylde*, and Baron *Wyndham*.

THE Caſe appeared upon the Order in fol. and a Verdict is for the Plaintiff, That his Father was dead before the ſigning and inrolling the Decree; And it coming to hearing 11 *Novemb.* 1671, before the Lord Keeper and Chief Juſtices *Vaughan* and *Hale*, before any determination of the Cauſe, they would be ſatisfied with Precedents, where a Decree ſign'd and inroll'd after the death of the Party, hath been, for that Cauſe only of the Death of the Party before Signing and Inrolling, reverſed.

A Decree not to be inroll'd after the Plaintiff's Death.

And this Day they produced for Precedents, *viz.* *Frere* Plaintiff againſt *Ewre* Defendant, which was heard 9 *Jannarii* 9. *Car.* 1. where the Defendant *Ewre* would have had the Adminiſtrator of *Frere* to ſign and inroll a Decree pronounced in *Frere*'s Life-time; and upon a reference to the ſix Clerks, they certified they could not by the courſe of the Court.

13 *April*,

Devering and *Cooper*, a cauſe heard after 30 Years, the Inrollment being loſt.

13 *April.* 20 *Car.* 2. An inrollment of Decree in 10 *Car.* 1. being loſt, the Cau after ſo long time ordered to be reheard

Sabyne Plaintiff, and *Allen* Defendant. A Decree ordered to be inrolled, if a Party died before *Eaſter*.

22 *Febr.* 20 *Car.* 2. A Decree made an ordeted, That if the Defendant died b fore *Eaſter*, yet that the Plaintiff may a terwards inroll it.

Pew Plaintiff, *Cadmore* Defendant.

2 *Dec.* 21 *Car.* 2. The Plaintiff an A miniſtrator; and after a Decree pronou ced, died before Entry of the Order, an the Entry is ſuſpended by the Admi ſtrator *de bonis non*, &c.

Cullum Plaintiff, *Dove* Defendant.

19 *Maii*, 22 *Car.* 2. Money, after a D cree inroll'd, certified due to the Exec tor of the Plaintiff; and upon Exceptio to the Report, they being no Parties Court, diſallowed; But theſe Precede did not ſatisfy, and thereupon the Bill diſmiſs'd, unleſs Cauſe.

Rich contra *Sydenham* 23 *Maii*, 1671, Lo Keeper *Bridgman*.

An unconſcionable Security for a ſmall Sum, ſhould not be helped in Equity to any thing to attach upon.

THE Plaintiff lent *Sydenham* a *Stidulph* 200 *l.* and they gave hi a Judgment of 1000 *l.* to pay 800 within three Months after either of the Fathers died, or they were married: *S dulph*'s Father died, and *Sydenham* marri

Coheir of *Porter*, who had a good Eate, but it was in Truſtees Names in oint of Law, and the Plaintiff's Bill was ſubject that Eſtate to his Judgment: ut it was held no equitable Conſideration, and therefore his Bill was diſmiſed.

Villiams contra *Smith*, *Hill.* 1671, Lord Keeper,

BILL to be relieved againſt ſeveral Securities got from young Mr. *Williams* preſently after he came of Age: herein were cited,

Miller and *Carter's* Caſe. Relief againſt Securities got from younger Heirs.

In Lord *Coventry's* Time grounded on Precedent in Lord *Elſemere's* Time, where n Accompt was directed to make appear hat was paid upon Security ſo got. *Godſcall* and *Walker* the ſame; alſo *Wal-r* and *Somers* the ſame.

But here *Smith* had a Recognizance nd a Mortgage, and a Bond for differnt Sums; and there appearing no ſurize on *Williams* when the Mortgage was ade, and nothing appearing but that he as a ſenſible Man, the Money on the ortgage is decreed with Intereſt; but n payment thereof, *Smith* to aſſign, and ot to enable himſelf to recover the Moy on the Bond or Recognizance by the ortgage.

9 *Car.*

Morgan Plaintiff, *Pindar* Defendant.

9 *Car.* 1. *per* Lord *Coventry*; an Award examined, tho' executed by ſeveral leaſes.

Cooper contra in 1671 or 1672.

An award ſet aſide.

A Butcher of *Croydon* Defendant, a the Plaintiff call'd him a Bankru and a Reference was made to Arbitrato who awarded 495*l.* damages upon t Plaintiff's Bill: It was ordered, Th notwithſtanding the Award, a Tri ſhould be had what the Defendant w damnified, and he had a Verdict but f 10*l.* and the Plaintiff was relieved agai the Award.

Chambers contra *Greenhill*, 9 *Julii* 167 Lord Keeper *Bridgman.*

A Demurrer was to a Bill of Revie exhibited on new Matter; f that it ought not to be admitted whe the Matter was of the knowledge of t Defendant at the time of the Anſwer a Hearing, tho' there was then no proof it: But afterward the Proof came to ligh

Colt & Colt.

And herein was cited, where the Defe dant ſets forth Deeds that made a Ti *per* Anſwer, but were loſt afterwards, a a Decree againſt them: But coming lig

ht afterwards, the Bill of Review was mitted; But the Lord Keeper ſaid, is Caſe was not like the other, and ſo effect diſmiſſed the Bill, but then gave me to produce Precedents.

ickland contra *Lock*, 12 *Julii*, 1672, Maſter of the Rolls.

HE Caſe is, A Leaſe was made in 1640. to Truſtees in Truſt to raiſe eral Sums, and the Overplus to go to Heir of the Leſſor: the Plaintiff's Bro-r, Son and Heir and Nephew of the ſſor, exhibited a Bill *per* Guardian in 63, to have an Accompt of the Pro- againſt the Leſſees, and dies; and the intiff *per* Guardian revives the Suit; d the Accompt is ſettled, and the Plain-. at 19 Years old, and his Guardian es 93 *l.* ſurplus of the Profits from Leſſees, purſuant to the Decree. The Plaintiff coming of Age, takes miniſtration of his Brother, and ex-its a Bill Original, without taking tice of the former Suit: And the De-dant, ſurviving Truſtee, pleaded the mer Decree and payment in Bar; and Queſtion was at arguing, Whether Plaintiff having had an Accompt as ir ſhall have it again as Adminiſtrator? d the Plea over-ruled.

Plea of a former Decree over-ruled.

Porter

Porter contra *Hubbart Hill.* 1672, Lo
Chancellor, *Vaughan*, and *Rainsford.*

Affignee not to be in a better Condition than the Mortgagee.

A Cauſe reheard after almoſt 4 Yea
proſecution, after hearing, and
being touching redemption of a Mortgag
how Intereſt ſhould be abated and
Accompt ſtated; the Caſe was,

That the Plaintiff's Father mortgag
the Manor of *Alfarthing*, 1636, for 5000
to *Dawes*, who entred in 1641, no In
reſt being then paid; and he enjoy'd
till 1649, and then the Executor of t
Mortgagee, aſſigned it to the Defendan
Father for 7000 *l.* part of a Debt owi
by *Dawes*, that was a Farmer of t
Cuſtoms.

The Defendant's Father enjoyed t
1663, and charged the Lands with
bove 5000 *l.* And in 1667, the Plaint
brought a Bill to redeem, which w
heard in 1669 by Juſtice *Rainsford*, a
a Redemption decreed, and Intereſt fr
1642 to 48, to be moderated to 4 *l.*
Cent. and profits to be accompted for.

The Defendant appealed to the L
Keeper *Bridgman*, who aſſiſted w
Moreton, *Tyrrel.* and *Wylde*, ordered
tereſt to be ſet againſt the certain Prof
from 1641 to 49, the Defendant's
ther's Purchaſe, but caſual Profits to
accompted for.

And what the Intereſt of the 5000 *l.* me to before 1641. to be taken as rincipal in 1649, at the Aſſignment; and tereſt to be computed from that time r the 5000 *l.* and Intereſt then due.

The Plaintiff, after 4 Years proceedgs upon this Order, appealed to my ord *Shaftsbury*, *ut ſupra*.

Who upon the hearing declared, That Aſſignee of a Mortgage ſhould be in a tter condition than the Mortgagee; d ruled Intereſt to be paid but for the ſt 5000 *l.* from the beginning, tho' ecedents were cited, *viz.*

rder and *Sayer*, *Mich.* 13 *Car.* 2. by Maſter of the Rolls. *Hamond* and *Caningſby*, *Mich.* 18 *Car.* 2. Lord Chancellor and Mr. of the Rolls. *Smith* and *Pemberton*, *Eaſt.* 17 *Car.* 2. Lord Chancellor, as expreſs in the Caſe.

But it is otherwiſe, if the Mortgagor ne into the Aſſignment.

And as to the abatement of Intereſt, it s alledged, That an Ordinance about 3, gave power to abate Intereſt for the ubleſome Times between 42 and 48, he Circumſtances required: And Preents were cited, *viz.*

nſell and *Jenkins*, 22 *Julii* 21 *Cor.* Maſter of the Rolls. Intereſt abated.

Upon

Upon a Mortgage in 1634, and then Redemption decreed, and Intereſt mitigated to 4 *l per Cent.* from 42 to 4[illegible] but there both Parties were in the King[illegible] Service, and the Lands ſequeſtred for t[illegible] Mortgagee's Delinquency, ſo that no pr[illegible] fit was made of the Land.

Lord *Cobham* and Lord *Roſs*, 15 *Ju*[illegible] and 1 *Julii*, 15 *Car.* 2.

The Lord Chancellor *Clarendon* a[illegible] Maſter of the Rolls; to redeem Mortgage made in *December* 1642, whe[illegible] it was ſo mitigated, that there the Mor[illegible] gagee promiſed to enter, and agreed ſo[illegible] do, but did not, whereby the Lands we[illegible] ſequeſtred.

Lord *Cornwallis* and *Miller* 1668, ma[illegible] upon the Precedent of *Manſell* and *Jenkin*[illegible] and without oppoſition, being upon [illegible] Extent and for a Tailor's Bill.

And the Caſe of the Earl of *Derby*, &[illegible] where Intereſt was quite taken away.

But theſe were upon the Reaſon, th[illegible] the Rents of the Lands were loſt, or b[illegible] little could be made: But in this Ca[illegible] of *Porter's*, the Lands yielded as much [illegible] that Time as at any other, and the Mor[illegible] gagee in Poſſeſſion in 1641; ſo that th[illegible] was no loſs by the Land more tha[illegible] Taxes.

But Mr. *Porter*'s Father was in the King's Army, being a Bed-Chamber-Man, and was a Sufferer in his Perſon; and therefore Intereſt was moderated to 6 *l. per Cent.* from 1642, not only to 48, but from thence to 51, and ſo until this Time. Intereſt moderated.

But *quære*, By what Power could it be moderated from 1648 to 1651, contrary to the Law, and never one Precedent in it? *Vide ante.* *Quære.*

But Mr. *Keck* argued, That it ought to be but at 6*l.* from 1636; for that by the Act made 1660 or 1661, to ſettle it at 6 *l.* it looked back to all Contracts before that Time; and that it was the conſtant Practice in the Exchequer, and that he was over-ruled in it by the Lord Chief Baron *Hale*, who drew that Act, and ſaid, that it was the intention of it.

And the Lord Chief Juſtice *Vaughan* argued for the total taking away the Intereſt between 1642 and 48; for that moſt Men then buried their Money, and so made no Intereſt of it.

But then a Man might have taken it up as occaſion ſerved, when as lent upon Mortgage, he could not have it when he would. And theſe Rules being given, an Accompt was directed both of caſual and accidental Profits from 1641.

Young contra *Cooke*, 9 *Apr.* 1673. Lord Chancellor *Ashley* and Justice *Atkins*.

Relief on an Award.

UPon a demurrer to a Bill, to be relieved against an Award-Bond for excessive damages given; and ordered, That the Defendant should answer, but the benefit of the Demurrer saved to the Hearing: Upon which the Cases of *Morgan* contra *Pindar*, and *Cooper* contra the Butcher of *Croydon*, were cited.

Post. 88.

Smith contra *Hanbury*, 16 *Octob.* 1673, Justice *Ellis*.

J. C. Ld. Ch. Nottingh. MSS. Prolegom. of Eq. ch. 30. pl. 75. Nels. Ch. Rep. 70.

Dower on an Equity of Redemption.

THE Plaintiff bought the Equity of Redemption of a Mortgage in Fee, and upon an Accompt directed of Profits taken under the Mortgage, by an Order on Hearing, 26 *Novemb.* 1670, it was also ordered,

That the Master examine, whether the Wife of the Mortgagee did recover Dower out of the Premisses, and what Satisfaction was made for that Dower, and certify how he finds the same.

The Master stated the Matter specially, That the Wife recovered Dower, and it was paid, the Sheriff having set it out.

And

And then the Queſtion was, Whether this ſhould go to diſcharge the Mortgage? And ſhe having recovered by Law, and received it without Oppoſition of the Mortgagor or his Heirs, it was ruled, That it ſhould not go towards diſcharge of the Mortgage, tho' the Heir of the Mortgagee did not prevent her Dower.

And it was ſaid, That the Heir of the Mortgagor might recover it of the Dowereſs: But *quære*, whether the Statute bars it or not?

But *note*, in this Caſe, ſhe was a Party to the Bill, but not brought to hearing.

Sherman contra *Cox*, Lord Keeper *Finch*, 24 *Octob.* 1674. 26 Car. 2.

J. G. Nelson's Ch. Rep. 71. Lord Nottingham's MS. Prolegom. of Eq. Ch. 21. pl. 27. & sic MS. Rep. no. 122. & 416.

ROBINS mortgaged his Eſtate, *Aug.* 5. to *Smith* for 99 Years, *Nov.* 5. to *Partridge* for 40 Years, 1654, and 55 to *Sherman* the Plaintiff's Husband for 1500 *l.* and afterwards to one *Browning*; *Browning* buys in the two firſt Mortgages. Equity of Redemption barr'd,

1664, *Sherman* the Plaintiff, Adminiſtrator *durante Minoritate*, exhibits a Bill againſt *Robins* and *Browning*, and ſets forth a Title to diſcover Defendants Title and redeem, and the Defendants anſwer; but

no further Proceedings were by the Plaintiff, *Browning* has notice of the Plaintiff's Title.

1666, *Browning* exhibits a Bill againſt *Robins* alone, to redeem or be precluded.

1667, He obtained a Decree, and the Accompt ſtated of what was due by a Report: And afterwards *Robins* got a Reference, and the time ſet to pay the Money or be barred.

All this time *Robins* was in poſſeſſion.

1667, after Preclusion of the Defendants, *Cox* bought *Browning*'s Intereſt.

1669, the Plaintiff brings a Bill to redeem.

The Defendant pleads his purchaſe, and the Equity of Redemption barred.

Quære, Whether *Browning* ſhould have made the now Plaintiff Party to the Bill to preclude, and whether the Plaintiff ought to be let in to redeem?

Lord Keeper declared,

The Caſe was to be judged by comparing them on both ſides, and ſo to choſe the leaſt inconvenience.

Parties. 1. He ſaid it was extream miſchievous to the Mortgagee to make all Parties that had Intereſt, Parties; for ſo every Mortgagee, in caſe of often Mortgages, was continually a Bailiff, and his work never at an end.

2. But ſaid, That he would be help'd at laſt in having his Principal, Intereſt and Coſt: For he may come in as to the 1,2,3, 4, *&c.* Mortgages. But in the other Caſe, if the Plaintiff ſhould not be relieved, it would be an irreparable Loſs and Ruin; and therefore thought Trouble and Pains leſs prejudicial than Ruin and total Loſs.

So over-ruled the Plea.

But declared, That the Accompt ſtated, and Report *per* Decree ſhould bind, unleſs the Plaintiff ſhould prove a great Colluſion; and declared, He would conſider of a Way to make Men take care to redeem Mortgages, either by making it a Rule,

1. That Intereſt upon Intereſt ſhould be allowed, *&c.* Or,

2. By taking away the Rule that Mortgagees ſhould anſwer for what they ſhould or might receive without their wilful default: And he ordered, That the Mortgagees Accompt upon Oath ſhould bind, unleſs diſproved by two Witneſſes. Parties Oath to bind.

In arguing this Caſe, were cited divers Caſes about 1672.

Roſcarrick and *Barton*, where *Barton* had Decree for Preclusion of an Equity of Redemption of a Mortgage of a dry

Reversion made in 1648, after a Woman's Death, who lived till 1668, and *Roscarrick's* Bill was to redeem as issue in Tail.

And upon the Plea, the Question was, Whether the Plaintiff as issue in Tail should have been Party to the Decree, that precluded the Equity? And resolved he need not, for that *Barton* could not have forced him to redeem, for the Mortgagor might have issue; and so the Plaintiff had no Title till the Mortgagor died.

At the Rolls.

Lord *Hollis*. Where it was declared the 3, *&c.* Mortgagee that had bought in the first Mortgage to bar Equity, was not obliged to make the second Mortgagee Party to that Bill and Decree.

Edwards contra *Allen*, 19 *Jun.* 1675. Lord *Finch*.

1. C. Rep. Temp. Finch 214. Nott. MSS. case 245.

Estate for Life in a Devise.

A Devise to such of the Children of *A*, viz. *B*, *C*, and *D*, as shall be living at the Death of *E*,

Is but an Estate for Life to the Children.

And adjudged, That in that Case, the Word *Children* extended to Grand-children.

4 *Car.*

4 *Car.* 1. was cited, where a Deviſe to four Sons was adjudged, That the three younger had but an Eſtate for Life, and the elder being Heir, the Inheritance belongs to him. *Taylor* and *Hodges.*

Ellard Plaintiff and *Warren* Defendant, *Term. Mich.* 1681.

A Decree againſt the Defendant for 500 *l.* was proſecuted to a Sequeſtration, and the Sequeſtrators in poſſeſſion of Lands of the Defendant, which the Defendant held for a Term; and upon Motion, ordered, That the Commiſſioners of Sequeſtration do ſell the Term towards ſatisfaction of the Decree. Sequeſtration.

Harvey contra *Harvey.*

A Decree againſt the Defendant, and a Sequeſtration upon it, and the Sequeſtrators in poſſeſſion of a great Houſe in St. *James's* Square, which was the Defendant's for Life; And upon Motion, ordered, That the Maſter allow a Tenant for the Houſe, and the Sequeſtrators to make a Leaſe, and the Tenant to enjoy. 2 Chan. Caſes 82.

Countess of *Suffolk* against *Harding & ux*
Jun. 1635.

Value of Lands charged with a Rent, no Cause for a Bill of Review.

UPon a Bill of Review, the Defendant had a Decree for 1800 *l.* and 200 *l. per Ann.* out of a Manor, which the now Plaintiff pretends not to be worth 50 *l. per Ann.* and to charge the Countess with the Rent and Arrear, who was no Party to the Grant of the Rent-charge, and therefore brought a Bill of Review.

Answ. That the value was no new Matter, and that it was not excepted to in the former Suit, and therefore now remediless; as in the Case of an Executor, who if he do not plead at first, that he hath not Assets, shall not afterwards when the Debt is decreed against him, be admitted to plead not Assets. Ordered, That if the Countess give not Security to perform the Order of the Court, the Bill be dismissed.

Executor cannot plead, want of Assets after the Debt decreed.

Greenhill against *Church*, 11 *Feb.* 1635.

Relief on an Award. *Ante* 82.

THE Bill was to be relieved against an Award submitted to by the Parties, and Bonds given to perform it. Court declared, They would neither confirm nor overthrow such Awards, unless

Cir-

Circumvention or Corruption were proved. But otherwiſe, if the Award was made by order of Court.

Nichols againſt *Chamberlain*, 21 *May*, 1646. before Commiſſioners.

J. l. Toth. 115.

Chamberlain was indebted to *Aiskew* 1000 *l.* and *Aiskew* makes his Will, and deviſeth divers Legacies, and makes *Chamberlain* his Executor and dies. The Plaintiff, a Legatee of *Aiskew*, demands his Legacy, and *Chamberlain* denies to pay it, and ſaith he hath no Aſſets, pretending the Debt he owed to be releaſed by his being Executor, and ſo not liable to pay Legacies: And it was ordered, That it was Aſſets. And upon an Appeal to the Houſe of Lords, it was referred to Baron *Trevor*, Judge *Pheaſant*, and *Holle*, who certified it to be a Charge in Equity.

A Debt due from an Executor to a Teſtator, Aſſets in Equity to pay Legacies.

See Vernon. 240.

Earl of *Suffolk* contra Sir *Richard Greenvill* & *ux'* 16 *Jun.* 17 *Car.* 1. Lord Keeper, Juſtice *Hutton*, and *Whitlock*.

THE Defendant, the Lady *Greenvill*, whilſt ſhe had a Decree againſt the Plaintiff for 600 *l. per Annum*; againſt which Decree the Plaintiff prayed to be diſcharged, in reſpect of a Deed of Aſſign-

ſignment of the benefit of that Decr
made by the Lady before her Marriag
unto one *Cutford*, upon a verbal Agreeme
between the Defendants before their Ma
riage, that ſhe ſhould have the power a
ſole diſpoſe thereof, which *Cutford* a
the Lady had releaſed to the Plainti
and the Plaintiff not having the Deed
produce, and alledging the Defendant S
Richard had gotten it and concealed
and the Defendant denying it; ordere

Defendants examined on Interrogatories:

That the Defendants and *Cutford* be e
mined upon Interrogatories for diſcove
of the Deed or a Copy thereof; and a
cordingly were examin'd, and the Mat
not being at all clear'd thereby,
what was the Contents of the Deed, m
than at the former hearing; the Co
maturely conſidered the Points in queſti
and conferring now together, were una
mouſly of Opinion, That there was neit
ſufficient Matter nor Proof at laſt Hear
or now, to bar the Defendant Sir *Rich*
of the ſaid Decree, or relieve the Plaint
and that the Arrears of the 600*l. per*

Things in Action.

decreed to the Lady, being in its o
Nature a Thing in Action, and ſo to
come by meerly by the Proceſs of
Court, cannot in Law be aſſigned ov
ſo that the Aſſignment to *Cutford* (if p
ved) was void in Law, and being
ought not to be mentioned againſt

R

Rule of Law in a Court of Equity, no Conſideration appearing to ſupport the ame, which ſhould make it better in E-uity than at Law. The ſaid Sir *Richard*'s erbal Agreement, in conſideration of the id Marriage, being in ſubverſion of the rounds of Law and right of Marriage; nd that unleſs the Agreement had been anſacted by a legal Aſſurance, and good Law, it was not fit for a Court of Equi- to give any ſuch Power to a *Feme Co-ert* as the Lady pretended to. And where- Things in Action, tho' not aſſignable, ere ſometimes turned over by Letter of ttorney, all the Court declared, That it had been ſo, yet preſently by the Marriage the Letter of Attorney had de-rmined; and that all Covenants, Pro-iſes and Agreements made by Sir *Richard* his Lady before Marriage, touching r diſpoſal of her Eſtate, were extin-iſhed by the Marriage: And that if *utford* had an effectual Letter of Attor-y, and the ſame had Continuance, he ould not in his own Name releaſe to the laintiff: And therefore that being void, remained a Party intereſted, and ought ot by his own Oath, being but a ſingle Witneſs (none but he ſwearing to the ontents of the ſaid Deed) to be admit-d a Witneſs for that purpoſe, there be-g alſo other Exceptions againſt him, in

An Aſſignment of a Decree without conſideration is void.

Letter of Attorney by *Feme ſole* determines by the Marriage.

A promiſe to her by her Husband is extinguiſhed by his marrying her. 1 Rep. in Chancery, 1 Vol. 26. 60.

Releaſe of an Attorney is void.

respect of former and continued Diffe
ences between Sir *Richard* and him: An
the Court held it very dangerous to a
mit the Contents and Sufficiencies
Deeds to be proved by Testimony of Wi
nesses, the Construction of Deeds being t
Office of the Court; and the Fact touch
ing Execution pertained only to the pro
of Witnesses; and so the Bill was dismiss'd
and Sir *Richard* at Liberty to prosecute t
Decree against the Earl.

Contents of Deeds not to be proved by Witnesses.

Offley contra *Jenney* and *Baker*, 19 Oct
1647.

THE Plaintiff and *Offley*, *Jenney* t
Defendant's Son, an Infant of
Years old, are Executors of Sir *John O*
fley, and the Plaintiff exhibits his Bill t
be relieved for a Debt; and a Demurr
thereto, because the Infant Executor was
Party: And the Bill being amended, an
ther Demurrer was, That the Infant d
not charge in the Bill by his Guardia
and the Father not being thought fit to b
Guardian, the antienteſt Six-Clerk is o
dered to be Guardian.

All Executors must sue, and be sued.

Six-Clerk a Guardian to an Infant.

All Executors must sue and be sued.

Smi

mith contra *Atterby*, 24 *Car.* 1. 1649.

A. Deviſeth Lands to his Wife for Life, and after to his eldeſt n, with Condition, That if his Wife uld be with Child, 80 *l.* ſhould be d by the eldeſt Son and Heir at Law he Child after the Mother's Death. e Wife had a Child; and after, the other and eldeſt Son convey away the nd to a Purchaſer; and upon notice ved of the Will, a Decree was made the Daughter for her Money devi- and declared, It was a Truſt devi- to go with the Lands; and yet this l was void in Law as to the Lega- ſeeing he who was to have the efit of the breach of the Condition, the Party (as the Heir) which ſhould the Legacy.

Deviſe void in Law, and yet good in Equity.

The Ground of the Statute of Wills, ch is 32 *H.* 8. *cap.* 1. is for the d of Children and Poſterity: In this e there were no Children, but the eſt of Poſterity.

Robin-

Robinſon contra *Fletcher*, 1653. Lor
Commiſſioners.

A Deed decreed not to be given in Evidence to bar a Title of Dower.

THE Plaintiff, formerly the W
of one *Fletcher*, who had bef
his Marriage been queſtioned for Tr
ſon, and thereupon made a Deed to
younger Son of his Lands, and then m
ries the Plaintiff: And being acquitt
afterwards dies, and the Plaintiff bri
a Writ of Dower againſt the H
whereupon the ſaid Conveyance is gi
in Evidence to bar her: And thereu
ſhe brings a Bill in this Court, and i
decreed, That that Deed ſhall not be
ven in Evidence.

Earl of *Carliſle* contra *Goble & ux'* a
others, Executors of *Andrews*, *Hill.* 16
Lords Commiſſioners *Widdrington*, T
ril, and *Fountain*.

THE Plaintiff mortgaged Lands
Andrews in Fee for 1000 *l.* and
venanted and gave Bond to pay the M
ney, and forfeited the ſame. *Andrews* d
leaving *Goble*'s Wife his Heir at L
Goble and his Wife exhibited a Bill ag
the Plaintiff to have the Money paid,
that the Plaintiff be foreclоſed of the
demption. It was decreed on that

hat if the Plaintiff, the Earl, did not
y them the Money by a Day, that then
ſhould be foreclоſed, and the Land be
ld abſolute againſt him. Afterwards
e now Plaintiff diſcovering that *Andrews*
e Mortgagee had made a Will and an Ex-
utor, which was lately proved, and had
ereby given the Mortgage-money to his
ecutor, exhibited this Bill againſt the
efendants (the Time given for payment
the Money being paſt) ſetting forth
e Matter *ut ſupra*; and that the Execu-
was no Party to the Decree, nor was
then known that there was either Will
Executor, and ſo to be relieved againſt
t Decree, and to be directed to which
pay the Money and have the Bond up,
s this Bill; which was an original Bill,
d not a Bill of Review. To the Bill
Defendants pleaded the Decree; and
hearing the Plea 'twas argued, That
is a Caſe of extraordinary Conſequence,
d if the Executor have the Right by
nd, Covenant and Will, the Court
not take it from him; and if the Heir
d the Land, the Plaintiff was liable to
Executor for the Money upon the
nd and Covenant, and ſo to a double
yment, which was hard: And the
urt was of Opinion, That in this Caſe
Bill of Review would lie; for that the
ecutor was no Party to the firſt Bill:
And

Original Bill to be reliev'd againſt a Decree.

Bill of Review will not lie againſt other Parties than in the original Bill.

And was alſo of Opinion, That in thi Caſe the Plaintiff could not have his Lan again, for that it was forfeited ſince th Decree; and if the Executor had th right to the Mortgage-money, he migh by Bill obtain a Decree againſt the He for the Land; or if it were ſold for th Price of it, yet the Court would no put the Executor to take that Courſe, fo that he had a remedy at Law for the Bon and Covenant, which the Court coul not hinder him of. Ordered, That th Heir ſhould anſwer without prejudice t his Plea: Afterwards at another Day th Plaintiff moved to be admitted to a Bi of Review. Ordered, That the He bring the Deed of Mortgage into Cour and that the Bond be alſo brought in and that the Heir ſhould ſell the Lan and bring in the Money there, to remai whilſt the Executor and Heir interplead for the ſame.

Decree avoided without prejudice.

Interpleader.

atred contra *Devaux* and *Colladen.* 1659. Commiſſioners *Widdrington, Tyrrel,* and *Fountaine.*

THE Plaintiff being left to his Action of the Caſe at Law, moved, hat inaſmuch as the Bill here was exbited within the Time limited by the at. of Limitations, and that pending e ſame, the Time was elapſed; the Deſdant might be ordered not to plead the at. at Law.

Maynard for the Defendant. The Bill only to examine Witneſſes to preſerve eir Teſtimony, and not to be relieved; d this Court cannot controul an Act Parliament, and the Plaintiff ought have lodged his Original in Time, as might.

Fountaine. If he had done ſo, the Deſdant would have brought it on by *Proſo* before it was ready; and it was the actiſe of this Court in like Caſes to ioin the Defendant from pleading the t. and cited a Caſe between *Chambers* d *Abdy,* which he ſaid was ſoon after e ſtatute was made.

A Defendant enjoined not to plead the Statute of Limitations.

Widdrington. It was a doubt in Doctor d Student, whether the Chancery could leve againſt a Statute Law.

Vide, *The Argument of the Juriſdiction of the Court of Chancery, at the end of the firſt Vol.*

Hoskins for the Plaintiff. It was th
Lord *Coventry*'s Rule in like Caſes, Tha
if the Defendants would not conſent t
wave that Plea at Law, he would reta
the Cauſe in this Court, and decree i
here. Ordered, That the Court be a
tended with Precedents. And upon ſigh
of Precedents, ordered a Caſe to be mad
and the Court would adviſe with th
Judges thereupon.

CASE

CASES IN CHANCERY,

Decreed by

William Cowper Lord Keeper;

AND NOW

Lord Chancellor of *Great Britain.*

A Bill in Equity to be relieved againſt an Accident or Fraud in the Writer of a Bond, who left out one of the intended Obligors Names, who yet afterwards had propoſed better Security, the other Obligor being broke and run away,

Crosby contra *Jonathan Middleton, Colliſon & al'.*

A Bond for 5 *l.* was ſealed and delivered by the Defendant *Jonathan* and his Brother *Thomas*, for whom he was to be bound; but *Colliſon* who drew the Bond, left out *Jonathan*'s Name: *Thomas* and the Plaintiff had ſeveral dealings together for many Years afterwards, till *Thomas*

broke and went to *Jamaica* in a Ship whereof the Plaintiff was Part-owner and after that ſold his part to one *Raycoks* in *May* 1700. Mr. *W.* being come to the Defendant *Jonathan*, and having folded down the Bond, ſhewed him the Condition, with his Hand and Seal, and demanded the Money or freſh Security; which he agreed to, and propos'd Mr. *Raycoks*, who demanding a ſight of the Bond, found the miſtake, and diſſwaded the Defendant from entring into new Bonds; Mr. *Bird* the Lawyer adviſing him that the Bond was void againſt him whereupon the Plaintiff exhibits his Bill to be relieved againſt the fraud in *Colliſon* and to have a performance of the Defendant and *Jonathan*'s laſt Agreement. And Mr. *Vernon* for the Plaintiff inſiſted, They were proper in a Court of Equity to be help'd againſt an Accident or Fraud: To which the Lord Keeper agreed. Mr. *Dobbins* for the Defendant, That the Party was never bound, had committed no Fraud; but on the contrary was circumvented into the laſt Agreement: For had he known that his Name was not in the Bond, he never would have treated: Urged the Preſumption, That it was paid and the ſtaleneſs of the Demand. If a Man make a voluntary Deed or Gift in writing which is not effectual, this Court will

Agreed the remedy was proper in Equity,

Obj. *e contra.*

and that the Plaintiff's Allegation was not proved.

will not aſſiſt, and they have not proved the Allegation, that they had refuſed to lend *Thomas* the Money, unleſs the Defendant would become bound for it, nor any Treaty thereon, nor Money lent, nor Contract proved, nor Bond nor Evidence, nor any Demand nor Intereſt paid in 49 Years; and what would be a ſufficient Time to ground a Preſumption of Payment, even at a *niſi prius*, if the Parties had been able, and we prove dealings of *Thomas* with the Plaintiff almoſt ever ſince.

Cur' pro quer.

Lord Keeper. The Defence will not prevail, for his Hand and Seal is ſufficient Evidence, and the omiſſion of his Name in the Bond a ſufficient Accident for Equity to relieve againſt. I muſt Decree it againſt you upon the firſt Agreement, for 49 Years is not a ſufficient Time to ground a Preſumption of Payment in Equity, as you would have it, but you may take an Iſſue and try Payment or Non-payment next Aſſizes. *Iſſue accordingly.*

Of ſufficient Time to ground a preſumption of payment, and leave given to try payment.

Sir *Charles Orby*, & *al'* contra Lord *Mohun*.

S. C. Free. in Chanc. 257.

Lord Chief Juſtice *Trevor*'s Argument to the Queſtion, ariſing upon a Settlement by Leaſe and Releaſe of *C.* Earl of *M.*

IN this Caſe the Lord Keeper deſired the Aſſiſtance of the two Juſtices; And the Lord Chief Juſtice *Trevor* firſt begun, and ſaid, The Queſtion in this Caſe, does ariſe upon the Settlement of *Charles* Earl of *Macclesfield*, who by Leaſe and Releaſe of the 23d. and 24th *Apr.* 83. ſettled all his Lands in *Cheſhire* on Sir *Henry Hobart* and *R. Maſon*, Eſq; and their Heirs, to the Intent that a Common Recovery ſhould be ſuffered to the uſe of himſelf for Life; remainder to *Charles* Lord *Brandon* his firſt Son for Life; Remainder to *Fitton* his ſecond Son for Life; Remainder to their reſpective Iſſues Male; Remainder for 99 Years to the Truſtees, for raiſing 12000 *l.* to be diſpoſed of as Earl *Charles* ſhould by Writing or Will appoint: And there is a Power in the Settlement, whereon the Queſtion ariſes, whereby it is reſerved to Earl *Charles*, Lord *Charles* and *Fitton*, ſeverally as they ſhall come into Poſſeſſion, to make Leaſes for three Lives or 21 Years, or any other number of Years, determinable on three Lives, in this manner; Firſt, of all or any of the Lands antiently and accuſtomably demis'd, whereof Fines have been

A common Recovery to ſeveral uſes.

Reſervation for Parties to make Leaſes, as they ſhould come into Poſſeſſion.

Of what Lands, &c. 1. Reſerving the antient Rents, &c.

been uſually taken, reſerving the antient uſual and accuſtomable Rents or more. Secondly, Of all the other Lands, reſerving the moſt improved Rents that can be got, and that the Tenants ſhould ſeal and execute Counterparts of their Leaſes. It happened, that there was no Recovery ſuffered, but there is a Clauſe in the Settlement providing, That till a Recovery had, the Truſtees againſt whom it was to be, ſhall ſtand ſeized of all the ſaid Eſtates, in ſuch manner as the Recoverers might be, after ſuch Recovery had.

2. Reſerving the moſt improv'd Rents.

No Recovery was ſuffered.

Proviſo for the Truſtees to ſtand ſeized as the Recoverers might.

Earl *Charles* afterwards deviſed by his Will, That the Sum of 8000 *l.* ſhould be paid to the Lady *Gerrard*, and 4000 *l.* to his Son *Fitton*, immediately after his Death, and directed the ſame to be raiſed and paid purſuant to the ſaid Truſt, and ſoon after died; and ſo the Eſtate came to Lord *Charles Brandon*, who being alſo intitled to the Remainder in Fee, as being Heir to his Father (to whom and his Heirs ſuch Remainder was limited by the Settlement) deviſed the ſaid Remainder to my Lord *Mohun*, and died afterwards without Iſſue; and ſo the Eſtate came to *Fitton*, Earl of *Macleſfield*, for Life, who made two Leaſes thereof, one Leaſe of the Eſtate not antiently and accuſtomably let, reſerving thereon the beſt

Deviſe by C. Earl of *M.* to raiſe and pay 8000 *l.* to Lady *G* and 4000 *l.* to Lord *F.*

Eſtate deſcends to Ld. *C. B.* in Remainder

Who deviſed the Remainder to the Ld. *Mohun*

Deſcent to *F.* Earl of *M.* for Life, who made two Leaſes to Sir *Charles Orby*, and Mr. *Orby* ſeverally.

21 Leaſe.

beſt improved Rents; the other bearing date 21 *December* 1702. wherein taking notice of the Power in the whole; and as to both parts of the Power, and that purſuant thereunto, and to execute the ſaid Power, he demiſed all the Land in the ſaid Settlement to Sir *Charles Orby* and Mr. *Orby*, ſeverally and not jointly, reſerving the ſeveral antient and accuſtomable Rents, and does not ſpecify what thoſe Rents are.

The antient Rents not ſpecified.

I am to give my Opinion herein, and to that end muſt take notice, That there were two Points inſiſted upon by the Counſel for the Plaintiffs; Firſt, As to the 4000 *l.* (for my Lady *Gerrard* made Lord *Charles* her Executor, and he made the Lord *Mohun* his Executor, ſo the 8000 *l.* is not in diſpute,) and the Queſtion is touching Intereſt; and I think upon the Power Earl *Charles* had of the 12000 *l.* it ought to carry Intereſt, for the Land was charged, the Term veſted, and the Truſtees might mortgage or ſell to raiſe it, and it was to be paid at the Time appointed, and he has appointed immediately after his Death: The Term is in the nature of a Mortgage, and tho' nor mortgaged, nor any Sale made, yet it is not material, for it was payable at the Time of his Death, and ſo muſt carry Intereſt from that Time it was due, and remains

Two Points. Lord *Mohun* being Executor for the 8000 *l.*

1. & If the 4000 *l.* ought to carry Intereſt.

That the Term is in the nature of a Mortgage, and ought to carry Intereſt.

ains in their Hands as a Mortgage; for would be only a Transferring to put it to other Hands: But I conceive a Deuction of Intereſt muſt be made for the ime that *Fitton* had the Eſtate in his wn Hands; for he muſt not have Inteſt, becauſe he received the profits himlf, out of which it was to be paid.

If there ought to be a Deduction of Intereſt.

2*dly*. Touching the Leaſes, and which the main Queſtion, Whether they be ell made in purſuance of the Power in he Settlement? And as to the firſt of he Leaſes I ſhall not ſpeak much, becauſe ſeems to be given up by the Counſel or the Plaintiff, and that a Reſervation at he moſt improved Rent is ſo uncertain, hat they will not at the Bar contend for , for that Reaſon. As to the other Leaſe, n Caſe a Recovery had been ſuffered, nd thereby a Power had come to him ccording to the Settlement, whether the eaſe would be good at Law? That's the Queſtion before us. And Sir *Charles Or-*'s Counſel lay down, as a Foundation hat they go upon, That altho' it be a eaſe by one Deed of all the Lands that ere antiently and accuſtomably demiſed, nd alſo of all the other Lands that were ot; that is to ſay, a Demiſe of all the ands within the Power, if that ſhould e conſtrued as one Leaſe, and one entire eſervation, it muſt be void as to the Remainder-

2 Q. If the Leaſes be well made.

1. Leaſe.

As to the moſt improved Rent, 'tis uncertain.

2. As to the other Leaſe, if it be good,

Is the Queſtion.

Being a Leaſe by one Deed of all the Lands within the Power,

If ſuch Leaſe be void as to the Remainder-Man.

mainder-Man; yet the Rent iſſuing out o
all muſt be apportioned, and ſo it would b
in Nature of ſeveral Leaſes in Conſtruct
on of Law, becauſe *reddendo ſingula ſingul*
the antient, uſual and accuſtomed Rent
ſhall be conſtrued to be reſerved, for th
Lands antiently and accuſtomably le
and no Rent being reſerved for the Land
not antiently demiſed, 'tis void as t
them. Now I am of Opinion, 'tis voi
as againſt the Remainder Man for all th
Lands; and it is to be conſidered, in wh
manner the Rents are reſerved: The Word
of the Leaſe are, Reſerving therefore th
ſeveral antient, reſpective and accuſtom
able Rents; and the Word (therefore
goes to all the Lands: For the Caſe c
ted out of 3 *Cro.* 340. *Tanfield* and *R*
gers; and *Winter*'s Caſe in *Dyer* 30
which is the ſame in effect, where th
Demiſe was of all the demeſne Lands an
Sale of the Manor, *ac etiam totum Manerium*
de Chanfield ac omnium Terr' & Tenement' ei
maner' ſpectan' habendum, the ſaid Scite an
Demeſnes, and alſo the ſaid Manor and Pr
miſſes; reſerving or yielding for the ſaid Sci
and Demeſnes, one Sum, and for the reſidu
another Sum, does not come up to this Ca
or this Uſe does not come up to it; for reſe
ving *therefore*, is for the whole: But ſay the
it afterward comes, and ſays, What ſever
and reſpective, antient and accuſtomab
Ren

That 'tis void againſt the Remainder-Man for all the Lands. Words of the Leaſe.

Reſerving therefore. &c.

Caſes cited are out of this Caſe; as 3 *Cro.* 340. *Dyer* 308.

(*Therefore*) is for the whole.

Rent are payable: That might do, if it might be conſtrued payable out of part, when reſerved out of the whole. But in *Knight's* Caſe, in the 5th *Rep.* it is reſolved, That what comes after the Reſervation ſhall not ſever it: And it was in that Caſe ruled, That what was after the *Viz.* was but a Deſcription of the Value. I mention this only, becauſe I am doubtful whether it can make it ſeveral as this Caſe is; but I deliver no Opinion for that upon it, becauſe I go upon another Reaſon, and taking it to be a ſeveral Reſervation, I am of Opinion it's a void Leaſe.

Knight's Caſe.

If this Reſervation be ſeveral.

Argum. That if it is ſeveral, yet it is a void Leaſe.

1. In the firſt Place, I conſider the Reſervation of the Rent in general Terms, without aſcertaining any Rent; and it has been argued at the Bar, That it is a good Reſervation, becauſe it is certain by Reference or Relation to a Certainty, *certum eſt id quod certum reddi poteſt.* Now I agree, the Argument will hold to ſome purpoſes, and ſuch a Leaſe may be good when it is made by Tenant in Fee ſimple, becauſe by making out the antient Rent, he may recover the ſame, and may diſtrain, and avow, and averr for the antient Rent; but as ſuch a Leaſe may be good, when it is made by Tenant in Fee ſimple, ſo it may in like manner be good, and the Reſervation thereupon void, if ſuch Tenant in Fee can-

Yet ſuch Leaſe may be good, when made by Tenant in Fee, ſimple, and how.

But he muſt make out the antient Rent, &c.

cannot ſet forth the antient Rent; or
he can ſet it forth, yet it will be voi
if he cannot prove what the antie
Rent is; for he muſt make out, that it
the antient Rent; Now here this Lea
was not made by him who was Maſte
of the whole Eſtate, and therefore wi
differ very much from what may be mad
by Tenant in Fee; for in caſe of Tena
in Fee, the Leaſe will be good, and th
Reſervation good or void according t
the Proofs he can make of the antie
Rent: But in this Caſe before us, the
muſt be ſuch a Reſervation as may
ſhall be, and is effectual to all Intents an
Purpoſes, and muſt not be by any mean
uncertain; and by this Leaſe the Remain
der-man poſſibly may, or may not b
able to aſcertain and prove what's th
antient Rent, and averr that ſuch a Sum
as he avows for, is the antient Rent re
ſerved; ſo that he is under a Neceſſit
of doing all theſe Things, and if he fai
in any one of theſe, he cannot recove
his Rent; and it may not be in his powe
ſo to do, for it depends upon Evidence
which is uncertain, and upon Matter o
Fact, which is alſo uncertain; and it ma
be the Rents antiently reſerved were no
the ſame Rents at all Times, but ſome
times greater, and at other times leſſe
Rents reſerved; and this Power is ove

But this Leaſe was not made by the Maſter of the whole Eſtate, and ſo differs much.

The Reſervation muſt be certain, and the Remainder-Man muſt make it out.

Uncertainties upon this Leaſe.

Lands where Fines have been taken, and conſequently the Rent muſt be more or leſs, according to the greatneſs or ſmallneſs of the Fines; and no doubt on the Trial, the Tenant may ſhew, that another Rent than what the Remainder-Man avows for, was antiently reſerved, and ſo Nonſuit him upon the Evidence as often as he ſhall think fit to conteſt it, whereby he may come to loſe his Rent. And this is the firſt Reaſon I go upon, That becauſe of the generality of the uncertainty of ſuch Reſervation of the Rent, this Leaſe cannot be good againſt the Remainder Man.

And concludes that this Leaſe canaot be good.

My Lord *Mohun*'s Counſel cited for their firſt Authority, the Caſe in *Cro. Car.* *Owen* and *Aprees*, which is very imperfectly reported there; for which reaſon Mr. Attorney-General got a Copy of the Record. I have ſeen the Record, and the Reaſon given in the Book ſeems to be a miſtake, for it is ſaid to be a Leaſe of three Manors, uſually let at 32 *l.* Yearly; But whereon the Biſhop reſerved the uſual and accuſtomed yearly Rents, and the Rents and Services at the Days and Times uſually accuſtomed; and becauſe he doth not ſhew any Rent in certain, the Leaſe is held void. Now that was not the only Reaſon, for my Lord Chief Juſtice *Vaughan* in *Thredneedle* and *Lynas*

2. Arguments as to *Owen* and *Aprees* Caſe in *Cro. Car.* miſtaken.

Thredneedle and *Lynas* Case.

Lynas Case, which is in the 3 *Keb.* 380, mentions another Reason, that is, That whereas there were three Manors usually let, the Lease was but of two; for there's an Exception of one of them by the Record it self: it should seem to me they went on both these Reasons; The Case in Truth was upon a Lease of two Manors, excepting the third under the antient and accustomable Rent, not specifying any: Now the three Manors have been usually let at 32 *l.* Yearly; therefore taking both these Reasons together the Lease was certainly void, because there never was any antient Rent for two but for three Manors; for if there had been 32 *l.* for two, that had undoubtedly been good: And because I conceive they did not go in that Case upon any of these Reasons singly, I think that Case can be no Authority, nor is it of any weight with me for my Opinion herein.

The Truth of the Case of *Owen* and *Aprees.*

Lewson and *Piggot's* Case.

The Counsel on the other side cited the Case of *Lewson* and *Piggot*, which was made on a Power reserved by a Settlement by Mr. *Venables* of *Cheshire*, to make Leases of Lands antiently demised, reserving 12 pence for every *Cheshire* Acre and thereupon a Lease was made by him of all the Lands antiently demised, reserving all the Rent intended to be reserved

12 pence for every *Cheshire* Acre.

d. The Cauſe comes to be tried in the King's Bench, where the Tenant who was Plaintiff recover'd, notwithſtanding the Reſervation was in ſuch general Terms; And the Lord Chief Juſtice *Holt*, and Lord Chief Juſtice *Treby* agreed it was a good Leaſe, and gave their Opinions accordingly. But that does not come up to his Caſe, for the Reſervation by the Power intended, may be aſcertain'd at leaſt 12 pence for every *Cheſhire* Acre: Tis known what is a *Cheſhire* Acre, and by Admeaſurement may be at all Times aſcertain'd, and depends not upon uncertain Evidence. There is another thing in my Opinion in this Caſe, which carries a great deal of weight with me; and that is, Tho' this be but one Deed, it muſt be conſtrued, as the Plaintiff's Counſel would have it to be, ſeveral diſtinct Leaſes under ſuch diſtinct Rents, as formerly all the antient demiſed Lands were uſually ſet at, ſeverally under ſeveral and diſtinct Rents; and it muſt be conſidered, That this is a great Eſtate *& non conſtat* how many Manors are contain'd therein; ſo that there the Remainder-man (for I muſt have recourſe to my former Argument) muſt upon this Avowry averr what Lands were particularly demiſed upon that Leaſe, or otherwiſe his Avowry will not ſerve him; for if he ſhould avow for more

Comes not up to this Caſe.

If this one Deed ſhall be conſtrued, ſeveral diſtinct Leaſes.

more or leſs, either of theſe two Miſtake will deſtroy it, becauſe it is a ſeveral Leaſe; ſo that it ſeems to be at a mighty great uncertainty, and to be a Leaſe and Reſervation directly contrary to what the Power meant and intended, and not in any wiſe made for the advantage of the Remainder-Man; as the Power by providing, That a Counterpart ſhould be ſealed by the Tenant ſeems to intend; by that it muſt be inferr'd that it was ſo provided, to the end that the Remainder-Man ſhould know what certain Rent was reſerved, and that upon what certain Lands in each Demiſe: Now this Deed may amount to twenty ſeveral Leaſes, and here is but one Counterpart for all; ſo that he cannot by any manner of Probability, nay it may be impoſſible for him to make out the ſeveral Rents and Lands. For firſt, he muſt have all the antient Leaſes, which can't be preſumed; for when the Leaſes are expired the Counterparts are uſually given up and not regarded, and ſo may be loſt; and therefore the Remainder-Man would be put to infinite uncertainty and inconveniencies; and it cannot be preſumed, that by the Settlement it was intended he ſhould be liable to any ſuch Obſtacle; but on the contrary, that he ſhould not meet with any of them; and therefore it prudently foreſaw

Proviſion for counterparts for the benefit of the Remainder-Man.

That here is but one counterpart for all.

Which may put the Remainder-Man to infinite inconveniences.

freſaw the inconvenience, and provided remedy againſt it, that there ſhould be certainty by Counterparts of every ſeveral Leaſe; and in ſuch Caſe he would be enabled to come at his Rent; but here is no more than one Counterpart for 20 ſeveral Leaſes, and not one Rent for any of them aſcertain'd, ſo that he had as good have none, and it can be of no account at all to him.

Here is only one Counterpart for 20 ſeveral Leaſes, and not one Rent aſcertain'd.

One Thing more I muſt take notice of that has been offered, and that is, ſay the Plaintiff's Counſel, This Leaſe, had here been a particular Rent reſerved, would not avoid any of the Inconveniences I mentioned, nor ſerve the Remainder-Man's purpoſe; for tho' there be an antient Rent reſerv'd in certain, he muſt averr it is the antient Rent: But I think that the Remainder-Man need only averr, That it is the antient Rent or more, and that's enough for him to averr in that Caſe. But I muſt only ſhew, that there is a vaſt difference, where a particular Rent in certain is reſerved and where not; for in this Caſe he muſt not only averr the antient Rent, but alſo prove it to be ſo; and if the Tenant ſhould prove another antient Rent, that won't make the Leaſe void, but bar the Plaintiff in Avowry: But in caſe of a particular Reſervation, he muſt truly averr the ſame to be the antient

If the Remainder-Man upon a particular Rent reſerved, need only averr, it is the antient Rent or more.

Averment in caſe of a particular Reſervation.

Rent; yet when he ſhews the particul Rent under the Tenant's own Hand; t incumbent on the Tenant to prove, th it was not the antient Rent: And if h ſhould not ſo prove, it will be preſum for the Plaintiff; and if he ſhould, t Conſequence will be, That he will then by avoid the Leaſe, which is abſurd t think that any Tenant will endeavou when it is made for his benefit; and not the Rent, yet the Land in that Ca would be recovered, but in this Caſe n ther; ſo that there is a great differen between thoſe two Caſes, in one he mu not only averr, that it is the antient Ren but muſt alſo prove it ſo; in the oth he need only averr it to be the antie Rent or more, and ſhew the Counterpa and the Tenant, if he will, muſt mak the proof (for it lies on him) to the co trary, which if he ſhould, would avo his own Leaſe; and ſo it is every wa better for the Remainder-Man to have particular Demiſe and a particular Reſe vation. Upon the whole, I think th Leaſe is not agreeable to the intenti of the Settlement, and ſo cannot be goo at Law.

Proof put upon the Tenant;

which will avoid his Leaſe,

and the Land will be recovered.

A great difference in the two Caſes.

And concludes, That this Leaſe cannot be good at Law.

Argument 2. Lord Chief Juſtice *Holt*.

Holt, Chief Juſtice. The Caſe has be truly ſtated and opened at large by m Brother *Trevor*, and I agree the Point to the Intereſt of the 4000 *l.* to be pa

rom the Time of the Death of the Teſta-
or, for the Money is then due, 'tis then
he Charge commences; and he that takes
he Profit muſt pay the Intereſt; and
here ought to be a deduction for Intereſt
or all the Time that *Fitton* enjoyed the
Lands, becauſe he had the Profits that
hould have paid himſelf the Intereſt; and
herefore he muſt take it by way of Re-
ainer. As to the Leaſe, I am of Opinion
hat it is a good Leaſe, for all the Lands
antiently and accuſtomably demiſed; for
he reſt, the Counſel of the Plaintiff do
ot contend: The Caſe is upon a Settle-
ment made, wherein there is a Power for
he Tenant for Life to make Leaſes of the
Lands antiently letten upon Fines taken,
reſerving the antient and accuſtomable
Rent, and a Leaſe of theſe Lands is made
in the very Words of the Settlement.

As to the Intereſt of the 4000 *l.* from what Time due.

And that there ought to be a deduction, and how.

As to the Leaſe, that it is good.

The Caſe ſtated as to the Settlement; and Power thereby given for Tenant for Life to make Leaſes.

1.

And firſt, I will conſider whether a Leaſe made by ſuch a Power be good, reſerving or rendring Rent in this manner, and in order thereunto, I will,

2.

Secondly, (tho' it does not go directly to the Matter in diſpute) but for the good of Poſterity, and which may give more light hereafter, explain what is meant by theſe Words in a Settlement or Leaſe, *Antient and accuſtomable Rent.*

Explanation of the Words, *Antient and accuſtomable Rent.*

3.

Thirdly, I will conſider where Lands antiently demiſed ſeverally, and where

Lands not antiently demiſed ſeverally, are altogether compiled in one Deed, whether that be not as well as if they had been demiſed by ſeveral Deeds?

1. As to the Power, if it be certain, then this Reſervation is certain.

And *Firſt*, conſidering the Power, it is thereby ſaid, *Yielding the antient and accuſtomable Rent*; and it is not denied, but that the Power is certain: Now will any one ſay, That a Reſervation purſuing the very Words is not as certain? If not, I am ſure the Power muſt be void; and if it be not uncertain in the Power, I am ſure it muſt be ſo in the Reſervation; for the ſame Words muſt have the Senſe in both, and general Words, tho' they do not refer to any certain particular, are ſufficient: And ſo is the Caſe of *Ameredith*, cited in the Abbot of *Strata Marcella*'s Caſe, 9 *Rep.* 29 b. and is indeed the very Caſe in Point. King *Henry* 8. being ſeized in Fee of the Manor of *Stephen* and hundred of *Cattridge* in the County of *Devon*, late parcel of the Poſſeſſions of *Margaret* Counteſs of *S.* did (*inter alia*) grant the ſame to his Queen *Katherine* for Life; and by another Patent granted to her for Life in the ſaid Manor and Hundred *Catalla felonum*, &c. Fines, *&c.* Royal Offices, *&c. Annum diem & vaſtum*, &c. with may other Royal Privileges and Exemptions to Queen *Katherine*; and afterwards the ſame came by Deſcent to

Ameredith's Caſe. &c. as to general Words.

Que

Queen *Mary*, who in the firſt Year of her Reign by her Letters Patents, granted the ſame Manor and Hundred to the Earl of *Huntingdon* and his Wife; and that they within the ſaid Manor ſhould have *tot, talia, tanta, eadem & hujuſmodi libertates, privilegia, Franchefias, Juriſdiction', &c. quot, tualia, quanta, &c. quæ præd' Comitiſſa* Sarum *ut aliquis vel aliqui præmiſſa aut aliquam inde parcellam ante habentes, poſſidentes, aut iſti inde exiſtentes unquam habuerunt, tenerunt aut gaviſi fuerunt, &c. infra præmiſſa, &c. ratione vel pretextu alicujus Chartæ Doni, ſeu conceſſionis, ſeu aliquarum literarum Patentium, &c.* in Tail, remainder over in Fee: And the Queſtion was, If the Patentee ſhould have all the Franchiſes, *&c.* which were granted as aforeſaid to Queen *Katherine*: And there was the ſame Objection, That the Reference was general and too uncertain: But the whole Court of Exchequer reſolved it was certain by Reference to the Charter of Queen *Katherine*, tho' it does not refer to the Charter, but by general Words *prout aliquis ſeu aliqui*, &c. and that ſuch general Reference was as much in Law, as if the Charters had been all recited herein. Now if ſuch a Grant was good in the Queen's Caſe, much more ſhall it be in the Caſe between Subject and Subject, and it would be a great deal harder

The Queſtion in that Caſe, and Obj as to a general Reference.

General Reference there allowed good in the Queen's Caſe.

to conſtrue it void in this than the other.

2. That by this Reſervation the Rents are certain.

2*dly*. It is a good Leaſe for this Reaſon, That by this Reſervation, the Rents are certain as they can be; and 'tis not the reſerving a Sum certain that makes the ſame certain, for even upon a certain Sum, or particular Rent reſerved, it muſt be averr'd to be antient and accuſtomable Rent or more, it is not what is reſerv'd on't as to the Sum, that is requiſite; but that it be the antient Rent or more, ſo that the bare Reſervation of a Sum only, does not make it good in *Whitlock*'s Caſe, in the 8 *Rep.* 69. b. there is the pleading; and tho' he may take his remedy by Debt or Avowry, yet 'tis plain in Avowry the Tenant muſt averr, what is the antient Rent, unleſs the Defendant will take upon him to averr the ſame; ſo that there will be no ſuch hazard as is preſumed; and therefore I am of Opinion, a Reſervation by ſuch general Words is good. My Lord Chief Juſtice *Trevor* agrees with me, That if it had been made by Tenant in Fee-ſimple, ſuch a Leaſe with ſuch a Reſervation might be good; if in one Caſe, I don't ſee why it ſhould not in the other: But take it, that he muſt averr that Sum that he declares for, to be the antient Rent. Sir *John Molyn*'s Caſe in the 6 *Rep.* 6. *&c.* is a Caſe in point; for there

Averment of the antient Rent receiv'd or more.

Whitlock's Caſe as to Averment.

Sir *John Molyn*'s Caſe.

here *tenendum de nobis*, &c. *per ſervitia inde debita & de jure conſueta*, muſt be made by Averment, as in this Caſe; there is an Objection made, That it will be troubleſome and inconvenient to him in the Remainder; I don't ſee how, and if it were, he ought to take the Eſtate as 'tis intended him: But it is ſaid, he will or may be at a great loſs to find out and prove what was the antient Rent: I would know who can do it better than he to whom all the Counterparts, Rent-Rolls and Evidences of the whole Eſtate muſt come together with the Land: All the Writings are of Courſe in his Hands, ſo that the Trouble, if any there be, can not ſignify any thing; no Body can know ſo well as himſelf; and if he will diſtrain he muſt averr, and may eaſily give Evidence what was the antient and accuſtomable Rents. I take the Reaſon of *Owen* and *Aprees* Caſe in 1 *Cro.* to be clearly with me: 'tis not intelligibly reported by Mr. Juſtice *Croke*; but that was not his fault, for it is miſtaken in the Tranſcribing only, becauſe he wrote a very ill Hand: Mr. Attorney has got a Copy of the Record; and the Caſe was this, There were four Manors uſually let at 32 *l.* yearly, and the Biſhop leaſes, three of them rendring the antient Rent: Now that was nothing, and ſo not good, for

As to Objection of being inconvenient to him in Remainder.

That the Remainder-Man is not put to ſo much inconveniency.

Aprees Caſe ſet forth again, differing from the former.

no ſuch antient Rent had been reſerved for the three Manors as 32 *l.* and it could not be help'd by Apportionment; but it had been good by reſerving it in this manner, that is to ſay, Rendring the antient and accuſtomable Rent, uſually reſerved for the ſaid three Manors, and alſo for the fourth, and that is this very Caſe before us. It is argued, That ſuch a Leaſe cannot be made, ſo as to take effect by any but the Tenant in Fee: Now pray ſee the difference, this is the ſame in effect, being made by a Power deriv'd from him that has the Fee, and the Leſſee is in mediately, tho' not immediately, which will make no difference here from him that has the Fee; And that is the expreſs Reſolution of *Whitlock*'s Caſe in the 8 *Rep.* 71, a. for the Power is reſerved to the Tenant for Life, and none other, who in Caſe the Settlement had not been made, would have been the Tenant in Fee; and the Power reſerv'd to him, favours ſtrongly of that he would have had with it the Fee.

Said to be the Caſe in point.

Upon a Power derived from Tenant in Fee.

According to *Whitlock*'s Caſe.

'Tis as if *Charles* Earl of *Macclesfield* had made it before the Settlement, or if he had made it after the Settlement, when he was in the ſame plight in all reſpects as *Fitton* was when he made it; That would have been the ſame thing; for being made only Tenant for Life, who was

And as good as if made by Tenant in Fee.

veſted with the Fee; 'tis the very ſame ning to all Intents in this Caſe, and as ood as if it had been made by him that as immediate Tenant in Fee-ſimple in oſſeſſion.

Now there remains only to ſhew how his antient Rent muſt be aſcertain'd, and hat was meant by thoſe Words *Antient nd accuſtomable Rent* in this Settlement; nd I take it, that's the Rent, and ſhall e at all times ſo underſtood, that was eſerved at the Creation of the Power, here a Leaſe was then in being, or that as laſt before that Time reſerv'd, where o Leaſe was then in being: For he that reates the Power, intends no more than hat the Leſſor and Leſſee ſhall not be able o put the Eſtate in a worſe Condition, ut keep it in the ſame plight and Con-ition at leaſt, as it was in when ſo ettled. Now ſuppoſe antiently there ad been variety of Rents reſerv'd, as for nſtance, 10 ſhillings before for many ears antiently reſerv'd, and 20 ſhillings me few Years before the Settlement; nd at the Time thereof the Lands were ot in Leaſe; in that Caſe the 20 ſhil-ngs, and not the 10 ſhillings, tho' a uch ancienter Rent, ſhall be the antient ent: for the length of Time in that aſe is material: And for this I depend pon a Caſe of undoubted Authority, and which

How this antient Rent muſt be aſcertain'd, &c.

Example upon variety of Rents.

which can never be ſhaken, and that
Caſe of *Morice* and *Antrobus*, an undoubted Authority.
the Caſe of *Morice* and *Antrobus* in the Ex
chequer; 'tis in *Hardreſs* 325, and wa
reported at large by my Brother *Cheſhir*
at the Bar, and was the Caſe of *Morice*
and *Atwood*. The petty Canons of St.
Paul's made a Leaſe, the 13 *Car.* 2. for 2
Years, of the Rectory of St. *Gregory*'s, t
the Plaintiff and his Wife, rendring 40
Several antient Rents.
per Annum and a couple of Capons, th
antient Rent had been firſt 25 *l.* then 37
then 38 *l.* and laſt of all 40 *l.* and th
Capons: And there my Lord Chief Ju
ſtice *Hale*, (to whoſe Authority I lean
held the Leaſe to be void, tho' it was
greater Yearly Rent than any of the an
tient Rents, except the laſt: And conſe
quently, as he alſo declared in that Caſe
the uſual and accuſtomed Rent was tha
reſerv'd upon the laſt Leaſe; and ſo muſ
Statute of *El.* expounded, according to the Rent upon the laſt Leaſe, and how.
the Statute of *Eliz.* be expounded on th
Word *Accuſtomed*; ſo that the antien
Rent in this Caſe is not to be taken i
reſpect of Time paſt, but of the Time t
come. I doubt, whether I expreſs m
ſelf ſo well to be underſtood, but I woul
ſay the Leaſe that was then, or laſt be
fore in being at the time of ſuch Settle
ment, the Rent thereon reſerv'd is th
antient Rent, in reſpect of any Leaſe t
Example.
be made purſuant thereunto; as if a Lea
was made four Years ago at four pounds
an

nd another be made now reſerving the ntient and accuſtomed Rent; that Leaſe t 4 pounds in reſpect of this Leaſe, hich was then a future Act to be done, antient, and the Rent thereof is old ent, in reſpect of the new Leaſe. I will ppoſe a variety of Reſervations at ſeve- al Times of Rent, as 10 ſhillings 40 ears ago, and 20 ſhillings 20 Years a- o; yet the laſt Reſervation of the 20 illings muſt be the antient Rent, other- iſe this Power cannot be executed: And herefore *ex neceſſitate* you muſt bring it o ſome certainty, as I have done, to now what muſt be intended by theſe ords *antient, uſual, and accuſtomed Rent*: nd for that I depend on the Caſe of *Mo- ce* and *Antrobus* in *Hard.* as a Caſe in oint; and the Reaſon of the Law is ith me, and 'twill be no anſwer to ſay, hat *ex neceſſitate* ſuch a Conſtruction as made there, becauſe it was an Eccle- aſtical Caſe; and a Dean and Chapter, nce reſerving a greater Rent than former- , can never diminiſh again; but Te- ant in Fee-ſimple may make Leaſes at o ſhillings, and afterwards at 10 ſhil- ngs, and then makes a Settlement as in is Caſe: What then, ſhall the 10 ſhil- ngs or the 50 ſhillings be the antient ent? And I hold that the 10 ſhil- ngs ſhall be, for *majus* and *minus* will

Upon variety of Reſervations.

Certainty *ex neceſſitate.*

Relies upon the Caſe of *Morice* and *Antrobus.*

nor

not be any Alteration of the Caſe, no
do vary it one way or other; as in the
Caſe of Dean and Chapter, who can in-
creaſe but not diminiſh, which is not the
Caſe of Tenant in Fee, and what he
might have done at the time of the Set-
tlement made, and which he then thought
was a Rent ſufficient, ſhould upon a Power
reſerv'd to him of his anrient Eſtate, be
the meaſure of his Intention; and with-
out a certainty the Power can't be execu-
ted, even by reſerving a Sum in particu-
lar. And ſo having diſpatched this ſe-
cond Point, which is not a thing which
comes now directly in Queſtion, I give this
my Opinion for a future good, and to be
remembred, That upon any Settlement
where a Power is reſerved to the Tenant
for Life to make Leaſes of the Lands in
that Settlement, which were antiently and
accuſtomably demiſed, and whereof Fines
have been taken at the antient, uſual
and accuſtomable Rent, for three Lives
or one and twenty Years, or any other
number of Years determinable on three
Lives, that Rent muſt be the Sum (and no
other) that was then or laſt before reſer-
ved upon a Leaſe of the ſame Lands in
being or expired laſt before the Time of
the Settlement made.

Dean and Chapter may increaſe, but never diminiſh the Rent,

Rule upon a Power reſerved to Tenant for Life (upon any Settlement) to make Leaſes.

3. Point in anſwer to Obj. That all the Lands are demiſed by one Deed.

The 3d Point is. That all the Lands in the
Settlement are demis'd by one Deed, when

s the Intent of the Settlement was, That ſeveral Leaſes ſhould be made of the ſeveral Manors and Farms, and ſo ſeveral Deeds and Counter-parts to be ſealed by he ſeveral Tenants: But now, as they re huddled up altogether in one, they nake but one Leaſe. To this I anſwer, That if the Reſervation be ſeveral, notwithſtanding they being compiled in one Deed, that can be in no ſort a Diminution of the Power; for ſuppoſe four ſeveral arms at four ſeveral Rents; as for Example, one antiently let at 40 ſhillings, nother at 20 ſhillings, another at ſo much, and the other at another Rent, nd all compiled in one Deed, reſerving he ſeveral Rents antiently reſerved for hem: Can any one ſay it is bur one Leaſe nd one Reſervation, or that it is not purſuant o the Power? Surely it is a good executing f that Power, and one Counterpart is as ood and effectual as twenty Counterparts. The Intent of the Settlement was, That the eſervation ſhould be ſo certain, that he to whom the Rent was to come, might know ow and for what he ſhould declare, *habendum* the four Farms at 4 Rents ſeverally and eſpectively, *&c.* for 99 Years, if *A.B.* or *C.* all ſo long live; That is a good Reſervation within the Intent of the Settlement; ſo the Authority of *Knight*'s Caſe in the *Rep.* 54. *Winter*'s Caſe in *Dyer* 308-9. and

That it can be no diminution of the Power.

Example.

That one Counterpart is as good as twenty,

As by *Knight*'s Caſe and others expreſs.

That ſeveral Reſervations may be in one and the ſame Deed.

and the Caſe of *Tanfield* and *Rogers*, Br 340. expreſs, That ſeveral Reſervation may be in one and the ſame Deed; an that the Reſervation here is ſuch a ſev ral Reſervation, and conſequently t Leaſe good; for that which was not ant ently demiſed will not hurt the othe but muſt fall to the Ground: Lands ant ently demiſed and Lands not ſo demiſe are letten in one Leaſe, reſerving the a tient Rent for thoſe that were antient demiſed, is a good Leaſe and Reſervatio and for the other Lands is void; and t contrary Opinion is contrary to all t Rules of Law; the putting of them one Leaſe will not be material to obje for by one Counterpart he may ſee wh are the ſeveral Rents reſerved out each Farm or Manor: But you'll ſay t reſerving therefore in joint Words, *Dem* all in one Word, the Words are *Demi Leaſe* and to *Farm let*, &c. Reſervi therefore, with Submiſſion, notwithſtan ing the Words are never ſo joint, yet th ſhall be taken ſeverally where they ha a diſtinct Subject-matter to work upo The Power is for ſeveral ſorts of Lands Eſtates, ſome demiſable antiently, t others not. 5 *Rep.* 7. Juſtice *Wyndha* Caſe, there was a Demiſe to *A.* for 10 ye of *Blackacre*, and a Demiſe to *B.* 20 Years of *Whiteacre*, and afterwa

Where Lands antiently demiſed and Lands not ſo, are letten in one Leaſe.

One Counterpart ſufficient.

Where words never ſo joint ſhall be taken ſeverally.

Juſt. *Wyndham's* Caſe.

a Demiſe by Indenture to a third Perſon, to commence after the Determination of the ſaid ſeveral Demiſes; which laſt Demiſe being of both Lands, and that to *A.* expiring 10 Years before the other to *B.* it was held, That the joint Words in the laſt Leaſe ſhould have a ſeveral and reſpective Conſtruction, *& reddendo ſingula ſingulis*, by the laſt Leaſe, the Term of 10 Years in *Blackacre* ſhould commence immediately after the Leaſe to *A.* expired, and in *Whiteacre* after the Leaſe to *B.* expired; ſhould commence, that is, in one 10 Years before the other; and ſo it muſt of conſequence and to all Intents, be a ſeveral Demiſe by joint Words in one and the ſame Deed of ſeveral Lands: In the like manner, in this Caſe the Lands are ſeveral, and the Demiſe muſt be ſeveral by this Deed, becauſe we muſt, to make a right Conſtruction, look back to his ſeveral Power, and it will be very hard to conſtrue this to be a void Deed of Demiſe, where it may be conſtrued to be a good one: And the Words here are as expreſs as can be to make it ſeveral; he ſays, Severally and diſtinctly, and ſo he demiſes them, and means to do it according to his Power and no otherwiſe. Theſe Words have been ſlighted at the Bar, but they ought not to be rejected; for they are very material: This Leaſe he makes

A ſeveral Demiſe by joint Words, *&c.* of ſeveral Lands.

That the Words here are expreſs to make it ſeveral.

That this Leaſe is made in purſuance of his power.

makes in purſuance of his Power, it would a ſtrange and hard Conſtruction to ſay, Th according to his Power he did demiſe th Lands jointly, when in expreſs Terms ſays, That according to his Power he dem ſed them ſeverally, as he ought to have do

Slingby's Caſe expreſs.

5 Rep. 18. *Slingby*'s Caſe is expreſs, That ſev ral Words are void, where they would wo on a joint Intereſt, and joint Words are vo where, they would work on a ſeveral Intere but ſeverally in a Covenant that be joi and ſeveral and works ſeverally; and plain Words can't be ſpoken than in this Caſe, ſ he ſays, Several Terms for Years. It has be

Reſ. ad Obj. that a Power of this nature ought not to be taken favourably.

ſaid, That a Power of this Nature ought n to be taken favourably, it being in pr judice of the Remainder-Man; I conſe I know not why; for if he that wou have otherwiſe been Tenant in Fee, b came Tenant for Life by ſuch a Sett ment, whereby that Power is reſerved him, that would have deſcended with t Fee, it ought to be taken beneficial for him, and that Power has a reliſh the antient Fee. *6 Rep.* 176. Sir *Edw Cleer*'s Caſe, that very improper Wor might ſerve to execute ſuch Powers. C ment *Harwood* ſeiz'd of three Acres Land of equal value *in Capite*, made a Fee ment in Fee of two of them to the uſe of h Wife for Life, for her Jointure, and aft wards makes a Feoffment by Deed of the

Sir *Edward Cleer*'s Caſe compared.

A

cre to the uſe of ſuch Perſon, *&c.* and or ſuch Eſtate, *&c.* as he ſhould limit nd appoint by his laſt Will in writing, nd accordingly deviſed it to a third Per- n in Fee; and tho' it could not be good s a Deviſe, but utterly void, inaſmuch s he had convey'd two parts before by ſt executed, yet it was held a good Ex- cution of his Power, becauſe it ought to ave a favourable Conſtruction; and herefore *ex neceſſitate* the Judges there had Recourſe to the Power *ex neceſſitate.* courſe to his Power, that it ſhould paſs y way of Limitation of the Uſe, even o' he took no manner of Notice there- by his Will, but deviſed the 3d part ge- rally in Fee; ſo here this Leaſe cannot good by a joint Demiſe of all the So here in this Caſe. nds in the Settlement, and may be good a ſeveral Demiſe of the ſeveral ſorts of nds or Eſtates therein: It ſhould be nſtrued to be a ſeveral Demiſe, tho' it d been demiſed joint, as it is not, and make it a good Execution of the Power, d conſequently a good Leaſe, *ut res ma- valeat quam pereat.* In the like manner the Caſe in *Hob.* 312. the Deviſe which *Hob.* 312. s void as an abſolute Diſpoſition of the tate, was conſtrued a good Revocation Execution of the Power, tho' no no- e taken of the Settlement therein, be- The Power ought to be conſtrued favourably. uſe ſuch Power muſt always be con- ued favourably, and with a beneficial

Intent of the Party to whom it is reſer-
ved, in Conſideration of the Eſtate h
has parted withal; and ſo is *Scrope's*
Caſe, 10 *Rep.* 143. b. A Covenant t
ſtand ſeiz'd to other Uſes than were i
the Settlement, adjudged a good Revo
cation of the Uſes in that Settlement, tho
not expreſs'd; and the true Reaſon is, be
cauſe ſuch a Power muſt at all Time
have a beneficial Conſtruction for hi
who is to have it; indeed he muſt pur
ſue Circumſtances and the Form preſcri
bed as ſuch a Reſervation, Counter-part
&c. but need not take Notice even of hi
Power; and if he ſhould make a Lea
without mentioning of it, and ſeemingly
as Proprietor, that ſhall be conſtrued, a
if it had been done by vertue and in pur
ſuance of his Power, if it could by n
means be done by vertue thereof, and
are all the Authorities: So that I con
ceive that there is nothing omitted tha
is requiſite to make a good and effectu
al Leaſe according to the Settlement
and I think it to be ſuch, and ought t
be conſtrued ſeveral.

As in *Scrope's* Caſe upon a Covenant to ſtand ſeiz'd to other Uſes than in the Settlement.

Circumſtances and Form to be purſued tho' no Notice taken of his Power.

So concludes nothing here omitted to make it an effectual Leaſe.

Lord Chancellor *Cowper* agrees to the firſt point as to Intereſt.

Lord Chancellor *Cowper*. The Caſe ha
been ſtated clearly and diſtinctly by m
Lord Chief Juſtice *Trevor*: And as t
the firſt Point, I concur readily wit
both the Opinions, that their Lordſhip
have delivered, becauſe the Creation

he Term from the Death of the old Earl *harles*, is in the nature of a Mortgage, nd ſo there muſt be conſequently Intereſt or the Mortgage-money from the Time was payable and due, which was at he Death of the old Earl *Charles*, and oung Earl *Charles* was in the nature of a Mortgagor, and the Eſtate being char-ed when it came to him with the Money, e was bound only as Tenant for Life to eep down the Intereſt, as is the com-on Rule of Equity; if he redeems, he to pay but one third of the Principal, nd he in remainder the other two thirds; at is the Courſe of Equity: Then when arl *Fitton* came into Poſſeſſion he was ot to pay Intereſt to himſelf, and ſo no tereſt after that 'till the Time of his eath, at which Time the Intereſt will ain revive.

Due from the Death of Earl *Char.* Sen.

Intereſt when kept down, and when revived.

Second Point. The ſecond Leaſe re-rving for the new Lands the moſt im-oved Rents, is under an abſolute un-ntrovertible uncertainty, and of no va-e to the Parties. The great Point is up-the other Leaſe, which is made as well the Lands antiently and not antiently miſable, both which are demiſed in e Leaſe: And I muſt own, with ſub-iſſion to better Judgment, That in this int I differ in Opinion with my Lord hief Juſtice *Holt*, and am of the ſame

That the Leaſe. as to the improv'd Rent, is uncertain.

The great Point is upon the other Leaſe.

And in this Point he agrees with the Lord Ch. Juſt *Trevor*.

Opinion with my Lord Chief Juſti
Trevor. I took Time formerly to con
der of it, when I was Counſel and
tended at the Bar, and becauſe it was
Caſe *primæ impreſſionis*, I made a particu
Obſervation on the Arguments at Bar
both Sides; and I am now of the ſa
Opinion I was then, and ſhall deliver
accordingly, making uſe of my old Not
Some things premiſed. But I muſt premiſe a few Things in or
to come at the Point in Queſtion; A
firſt, It is agreed by both my Lords
Juſtices, to be a Queſtion meerly
Common Law, and not to have a diff
ent Determination in this Court fr
what it would receive at the Courts
low; and it is here now in the ſame m
ner, as if there had been a ſpecial V
dict here before me, where Equity ca
That Equity will not help this Leaſe, but it muſt ſtand and fall, as if a Recovery had been ſuffered. aid, nor will it help this Leaſe, it not
ing compleatly executed in all reſpe
I ſpeak this, becauſe the Counſel for
Plaintiff ſeemed to direct ſomething
way, as if in Caſe any thing were wa
ing it might be relieved; and I am cle
ly of Opinion, That it being a volunt
Execution of a Power, not done upo
valuable Conſideration, 'tis not a M
ter by any Means proper to go befo
Maſter upon, but muſt ſtand or fall
can; for if it be good, it muſt be dec
good, if bad, it muſt be decreed

no'never ſo inconvenient to the Remainder-
lan, or the Leſſee; and ſo it is in the ſame
ondition, as if a Recovery had been ſuffered.

2*dly*, As to the Reſervation, the Que-
ion is not, if it be void between the
eſſor and Leſſee; and it was argued ve-
fallacioufly at the Bar for want of ma-
ing this Diſtinction or Difference, where
ade between Party and Party may be
ood, but to bind the Intereſt of a third
erſon or not is the Queſtion, and whe-
er within the Execution of the Power:
ow by the Limitations to the Power,
is plain, they were made for the bene-
of the Remainder-Man: I will eaſily
ant, That when he in remainder for
ife came into Poſſeſſion, he might leaſe
he pleaſed; and as to him the Reſerva-
on is not void, becauſe it may happen
be recovered; but as to the Remainder-
lan it is void, becauſe it may not happen
be recover'd; ſo you ſee by this diſtinc-
n it is not void, for uncertainty abſolutely,
ut yet it is not abſolutely and perfectly
rtain: Some Things are in their Nature
ncertain, ſome accidental; and to argue,
hat if a Thing as this Rent is, be not un-
rtain, then 'tis certain; and if certain,
is then good to bind the Remainder-
lan; this is not fair arguing; the firſt
on't follow, for there is a wide *Medium*
tween not abſolutely uncertain and cer-

Reſervation between Party and Party may be good.

But the Queſtion is, Whether it may bind the Intereſt of a 3d Perſon, &c.

That this Reſervation is void as to the Remainder-Man, and the Reaſon thereof.

Unfair arguing as to certainty and uncertainty.

A wide Medium.

tain, for future Events may alter the C here; ſo it is not abſolutely uncertain certain, as if he can be able or ſo luc as to pitch upon the Sum that was t antient Rent; if he can alſo prove it be ſo: And if it ſhall happen, that t other ſhall not be able to prove that a other Sum was the antient Rent, th theſe three [ifs] being ſo luckily wi him, it may be a good Leaſe, and may recover his Rent; but if the cont ry to any one of theſe [ifs] happen, can't be certain; on the contrary he m fail and the Leaſe is bad, ſo as to be a ſolutely void for uncertainty, yet not as abſolutely uncertain, and the Remai der-Man for whoſe ſake the Limitatio are intended, is no Party. Now it is n only capable and poſſible never to be r duced to a certainty, for the Remainde Man may meet with Difficulties inſupe able, and if any uncertainty in it, the Le will be void as to him; And to preve any ſuch uncertainty there may be reſe ved the antient Rent or more, and tha alternative, and then the Leaſe will be goo according to the Settlement. 'Tis ſai the antient Rent is certain by referri to the laſt Rent, at or next before t Time of the Settlement, where no Le was in being: I do not agree to that wi Submiſſion to the greater Judgment: Su

If three If's or Suppoſitions be with the Remainder-Man,

it may be a good Leaſe, but if not, then 'tis bad.

Here the Remainder-Man may meet with difficulties inſuperable.

'tis good to reſerve the antient Rent or more, to prevent uncertainty.

Anſw. as to referring to the laſt Rent.

poſe it leas'd once at a greater and twice at a leſſer Rent, I take the Rent of the former Leaſes to be the antient Rents, for the laſt might be made by him that had the Fee, who is not bound to reſerve the antient Rent, but may let it for nothing if he pleaſes; here are Lands antiently demiſed, whereof Fines have been taken, ſo that here is a flat impoſſibility to make the Diſtinction, becauſe the Lands have been let in all probability for more or leſs, as the Fines have been higher or lower.

He that has the Fee is not bound to reſerve the antient Rent.

The third thing I premiſe is this, That the Reſervation and Deed being to be made upon a reſtraint of the Power, muſt be taken ſtrictly againſt Tenant for Life; becauſe of the limited Acts he is to purſue, and liberally for the Remainder-Man, becauſe that Reſtraint was intended for his benefit; and there are multitudes of Authorities in the Books, That ſuch a limited Power muſt be taken ſtrictly againſt the Tenant for Life; becauſe tho' the Power be for the benefit of Tenant for Life, yet the Reſtraints are put upon him for the benefit of the Remainder-Man; and if we ſhould go on both the Reaſons together, it muſt ſtill be taken for the benefit of him in Remainder: And for this I inſiſt on the reverſe of the Reaſon in *Mountjoy*'s Caſe, 5 *Rep.* 3. b. That was an Eſtate Tail created by Parliament,

That the Reſervation and Deed ought to be taken ſtrictly againſt Tenant for Life: becauſe of the reſtraints put upon him. The Reaſon in *Mountjoy*'s Caſe reverſed, where the Power of Tenant in Tail was made narrower.

liament, and he had a narrower Power by the Act than the Law wou'd have given him as Tenant in Tail; therefore that muſt have a reaſonable Conſtruction according to the Makers of the Act: *Vice verſa*, here the Power of Tenant for Life is by way of enlarging the Eſtate, and being in Augmentation of it muſt be taken ſtrictly, and ſo muſt it be taken according to natural Reaſon: Now according to that, this can't be a good Leaſe to bind the Freehold and Inheritance of the Remainder-Man, for in conſtruction of Deeds, the true genuine ſenſe and meaning of the Parties muſt be attended, we muſt conſider each part of the Power in the Deed: And in reſpect of Rent the Rent reſerved muſt be in as good Condition as the antient Perſons that held the Eſtate enjoyed the ſame; it was not intended that general Words, eſpecially that theſe mentioned in the Settlement, ſhould be *verbatim* turned into a Reſervation in the Leaſes, but provided ſo a certainty to be had in every Reſervation of what Rent ſhould be reſerved, and that to be particular, that he in Remainder might have a remedy upon his Action, for a Rent reſerved certain, and in Terms as formerly had been uſed to be reſerved for the Land; or at leaſt ſo that it might be reduced to a certain Rent by referring

Here the Eſtate of Tenant for Life is enlarg'd.

Conſtruction of Deeds conſider'd.

The Intention of the general Words in this Settlement.

For a remedy to the Remainder-Man.

ferring to a Certainty: And this is the ain and honeſt Meaning of the Parties, nd not to involve the Remainder-Man perpetual controverſy and uncertainty, s in this Caſe he is obnoxious to; 'tis hat the antient and accuſtomable Rents e reſerved, there will be a certain Sum eſerved, and here it is diſputable what the antient Rents, and 'tis ſaid, (*or more*) that it may be aſcertained without iſpute; and it was intended, that a cer- in Sum be reſerved where the Rents ere even indiſputable, for a certain Sum all Caſes muſt be reſerved, and the ontrary would produce Inconvenience, r always a certain Rent was antiently eſerved, and ſo it was intended by ha- ing the Counterparts; and I rely upon in this Caſe, that he is under greater iſadvantages than any Free-holder for- erly had been; for let us conſider what is that by allowing this Leaſe to be ood, the Reverſioner muſt prove; he uſt ptove the Lands he avows for to be ithin the deſcribing Words of the Leaſe, nd that the Leſſor was in poſſeſſion, hich he can't do here, becauſe it is pro- iſcuous and can't be known what Lands r what Rent; but if there had been a ounterpart, the Leſſee would be for- ed to ſay the Leſſor was in poſſeſſion, nd ſo the Leaſe would be a Concluſion, at

That he might not be involv'd in perpetual Controverſy, *&c.*

The great diſadvantage of the Remainder-Man.

What the Reverſioner muſt prove if the Leaſe be good.

Advantage if there had been a Counter-part.

at leaſt an Evidence of the Rent: But here he muſt prove ſuch a Sum as he declares for, and neither more or leſs, was the antient Rent, or the Tenant will baffle him as often as he pleaſes; the Rent reſerved here is neither like, nor the ſame Reſervations and Rents as uſed antiently to be reſerved; and to argue, That tho' an expreſs particular Sum had been reſerved, the Tenant might put it upon him to prove that it was the Rent antiently reſerved, or more; and ſo he in Remainder muſt prove what was the antient Rent altho' a certain Sum had been reſerved. That is not to be argued, 'tis a hard Suppoſition, That a Man ſhould go about to deſtroy his own Leaſe, that he holds under, for ſo it would be, otherwiſe he can never avoid payment in an Action of Debt for the Rent; and if in ſuch Action he ſhould deny it to be the antient Rent, the Leſſor or he in Remainder might bring his Ejectment, and upon ſhewing the denial upon Record would recover the Land and put him out. Now this Caſe here varies, for the Tenant may baffle the Leſſor twenty times over, and yet keep the Lands in deſpight of his Teeth; But if the antient Rent had been reſerved, there would have been no ſuch danger, and the Remainder as well as the Leaſe had been good; but now he may ſhift

'Anſ. to Obj, That tho' a particular Sum had been reſerv'd.

If the Leſſee ſhould go about to deſtroy his own Leaſe.

The Leſſor or he in Remainder might bring Ejectment. This Caſe varies and gives great advantage to the Leſſee; but otherwiſe if the antient Rent had been reſerv'd,

ſhift here, as often as he can ſhew there was any other Rent antiently reſerved; ſo that I muſt be of Opinion, That this Reſervation in the manner here reſerved, is reſerving a worſe Rent than uſed antiently to be reſerved, and that the reſtraint in the Settlement means, That he in the Remainder ſhall have the ſame in all material Qualities as well as the Quantity of the Rent, and a remedy to attain to the certainty and recover the Rent as well as the former Freeholders could. There are many Caſes to this Point put in *Mountjoy*'s Caſe in the 5 *Rep.* and I take them all to be very good Authorities, becauſe being put by the Counſel at Bar, they were denied to be Law, as a Reſervation of Rent to be paid at two Days, where antiently it had been payable at four, not good; if Silver, where antiently it had been in Gold, and many others there put were denied by the whole Court.

The Intent of the Settlement as to the Rent.

Good Authorities in point in *Mountjoy*'s Caſe.

4thly, That this Leaſe as againſt the Leſſor is not void, but againſt the Remainder-Man 'tis void, becauſe not ſo beneficial as uſual, and a very minute difference will ſerve to avoid it, which might have been prevented in purſuance to the Settlement by reſerving more than the antient Rent: but here is none; and if there be, it muſt have all the beneficial Qua-

That this Leaſe is void as againſt the Remainder-Man.

It might have been prevented by reſerving more than the antient Rent.

Qualities of the Rent anciently reserv'd and those ought to be reserved and observed, as *Mountjoy*'s Case in the 5 *Rep.* says.

Cases denied. And there several Cases for want of that denied to be Law, as Silver for Gold, or two Rents or two Manors conjoin'd, a part of the Manor for an apportionable share or part of the Rent, as if 20 Acres had been set for 20 *l.* each Acre of equal value, it is not a good Lease if 10 of those that were even be let at the Rent of 15 *l.*

In this Case a stress is laid. such a Lease would be void; in the Case before us it is much stronger, because the original Parties to the original Power have laid a stress on this very thing, as they foresaw and would prevent it; for the Lessee by that shall execute and sign a Counterpart of this Lease: But the Deed here signifies nothing, it is a shadow, and being particular of the Manors as they were anciently set distinct, the Tenant may deny he held any particular parcels, he may say, These and these Lands are not contain'd in any Box, as he may call it, of several Leases, and insist upon any Rent he pleases, in 20 several Actions brought by the Remainder-Man and may nonsuit him on the Evidence in every one of them; and he is estopped to say nothing, but Signing and Sealing it was intended that several Leases should be made, and several Counterparts, and so ver-

For the Lessee to sign a Counterpart.

What advantage the Tenant may take hereupon against the Remainder-Man.

veral Rents certain, and that to uncer-tainty, for which the Settlement provi-ded: And all which the Parties foreſaw.

Another Reaſon, or rather Obſervation, which may ſerve to anſwer what my Lord Chief Juſtice *Holt* ſaid, That if the Settlement were certain, the Deed was as certain, and that the general Words in the Power are good for a Reſervation: But a true way to execute a Power like this, is not to do it in the general Words of the Power: In all Caſes they muſt reduce the Rent to a certainty by particular expreſs Words; Suppoſe (as I have ſeen in ſome Deeds) that there was a Proviſo, That in every Leaſe there ſhould be inſerted ſuch Covenants as are uſual to be inſerted in Leaſes in that County where the Lands lie, *&c.* and a Leaſe ſhould be made with a Proviſo in the very words of the Deeds: That would not be good, nor could it be aided by any ſpecial Verdict, finding the Covenants uſually, *&c.* And the Words (*or more*) alters it extreamly, and the Leſſor muſt lay hold on both the antient Rent or more: whereby 'tis denoted, That in obedience to it, he muſt do it one way or other; but ſtill it muſt be certain.

A third Obſervation or Argument which I make is, Admitting the Sum reſerved not neceſſary to be a certain Sum, ſure it muſt

Another Obſervation or Anſwer to the certainty of the Settlement or Deed.

Of the true way to execute a Power like this.

Upon a Proviſo in Deeds to inſert ſuch and ſuch Covenants.

The Words (*or more*) make a great alteration, but ſtill it muſt be certain.

That the Sum reſerv'd muſt refer to an abſolute certainty.

must refer to an abſolute certainty; as in the Caſe of *Leviſon*, there was an abſolute Mathematical Certainty, than which nothing can be more certain: And in the Caſe of *Leviſon* and *Pigot*, the very Power provides it ſhould be ſo, at leaſt 12 *d.* for every *Cheſhire* Acre; ſo that it muſt refer at leaſt to ſomething certain; But this refers to nothing that is ſo; on the contrary, to a Thing that is fluctuating, Cuſtom and Uſage; the which nothing is more uncertain than Antiquity and Cuſtom: 'Tis certain at the time of an old Leaſe there was a Rent exiſting, and it was then known certainly what it was: But to make this good, it muſt now alſo be known what it is, but may be it is unattainable by human Knowledge: As to the Thing in queſtion, there is Certainty abſolute and natural; but we mean uſeful Certainty for the benefit of Property, and in that reſpect referring to Cuſtom and Uſage is uncertain? And therefore *certum eſt quod certo reddi poteſt*, if fitted to maintain, that whatever in itſelf is once certain, muſt be ever certain, will not be granted; for it may or may not be certain according to future Events, and much leſs to bind a third Perſon: And it is contradicted by *Owen* and *Apree*'s Caſe, 1 *Cro.* 94. Suppoſing it had been referring to a Leaſe or Leaſes, between ſuch a

one

As in *Leviſon*'s Caſe.

But this Caſe refers to nothing ſo, but to fluctuating Cuſtom and Uſage.

one and ſuch a one, that alſo had been void between the Leſſee and Remainder-man, becauſe the Reverſioner might loſe the Leaſe; and ſo there is not any equivalent, to which he may at all times reſort to be aſcertain'd as in *Pigot*'s Caſe; therefore it is not a good Reſervation where it is not certain in it ſelf, but refers to antient Cuſtom and Uſage. There is as to Nature an uncertainty, and an uncertainty as to the Underſtanding; as for ſaying, That a Verdict would have aſcertain'd it, that would be aiding the Defect, and to go before a Maſter or Jury to find; and what were the antient Rents, is ſupplying a Defect, which has been made in executing a Power againſt common Right; this is really not an abſolute but a conditional Reſervation, good between the Leſſor and Leſſee but not to bind the Remainder-Man. The Condition is, *I let theſe Lands abſolutely, and if an antient Rent can be found, and you the Remainder-Man can prove it, then I reſerve it to you: But if there be none, and if there be, and you cannot prove it, you are to have none.*

What if it had referr'd to a Leaſe between ſuch a one and ſuch a one.

This Reſervation is conditional and good between Leſſor and Leſſee, but not to bind the Remainder-Man.

The Condition what.

There is another uncertainty, which I won't need to help on, and this is in the Thing demiſed, and that runs to *Apree*'s Caſe: Where Lands are demiſed by ſufficient Deſcription, the Leſſee can't go back,

Where the Lands are demiſed by ſufficient deſcription the Leſſee can't go back, unleſs he forfeit the Leaſe.

back, unleſs he forfeit the Leaſe: But here they are ſo demiſed, That tho' the antient Rent had been reſerved, yet the Tenant may ſay the Lands are more or leſs; but if they had been diſtinctly demiſed and he ſhould ſay ſo in pleading, he would forfeit his Leaſe; but here is no light at all for the Leſſor to go by, the he finds the certain Rent; ſo that it only a bare poſſibility, that by the help of great Charges, good Fortune, and the industry of himſelf, he may come at his Rent, if he can aſcertain the very Lands antiently demiſed and their reſpective Rents; or if either the Lands be miſtaken or the Rent, he is ſtill to ſeek for Lands leaſed for the Rent reſerv'd antiently on theſe Lands, and there be leſs Lands in the Leaſe than antiently were let, that is not a good Leaſe; but if leſs or fewer Lands than antiently were let be demiſed for the ſame Rent in certain that had been well.

But here he may ſay the Lands are more or leſs.

But here is only a bare poſſibility attended with great Charges, &c.

If leſs or fewer Lands than antiently be let for the ſame Rent, in certain 'tis good.

In the third place, If there had been a Recovery, and a Leaſe of the diver Land in the Recovery it would be bad, an the ſame Exception would hold; but th antient Rent being a Sum of Money, yo might reſerve more than the antient Rent And ſo it appears, That altho' I had re ſerv'd by the Words antient and accuſtomable Rent, that would be good:

If there had been a Recovery, &c.

hat *Certum eſt quod Certum reddi poteſt* ill not do in this Caſe; if you can aintain the Reſervation on the Leaſe, et the Leaſe is not in ſeveralty as for- erly the Lands were demiſed; and there- re it will be that Caſe in point; or if ou would make it a ſeveral Leaſe, yet ere are more Lands, and then it will be tronger againſt you than if there had een leſs. O, but ſay you, it is the an- ent Rent is reſerved only for the Lands ntiently demiſed, and not for the other ands; that won't follow, for the ſame ands are not demiſed in the ſame ſeveral eaſe; the Words are ſeverally, and not intly of all the Lands in the Settlement, citing the Meſſuages, Tenements, and ereditaments in ſeveral Manors in the ounty of *Cheſter*, and all and ſingular e Lands compriſed in the recited Power, *bendum* for 99 Years, if Sir *Charles Or-*, &c. ſhall ſo long live, and yielding d paying therefore yearly the antient d accuſtomable Rents uſually reſerved d payable; (not ſaid heretofore) in the aſing part, only there is a ſeveralty, for e Leaſe is ſeveral, and not joint of all e Lands in the County of *Cheſter*, &c. d alſo of all the other Eſtate: 'Tis a Se- rance, but it is the minuteſt that can ſeveral; ſuppoſe of four Fields and ur Meſſuages ſeverally, where uſually

Certum eſt quod certum reddi poteſt, will not do in this Caſe.

That the Leaſe is not in ſeveralty: but what if it was?

Obj, That the antient Rent is only reſerved for the antient Lands.

The Words of the Leaſe.

(Heretofore) left out of the *Reddendum*.

Here is the minuteſt ſeverance that can be.

two Fields and two Meſſuages were let; that would not be good, for it muſt be a Severance of all the Things demiſed: And I take the Words to be ſuch, yet the Lands are not uſually perhaps let by Manors, *&c.* and the Reſervation, *&c.* yet has relation to Uſage or Cuſtom in the demiſing part: Nor is it ſaid as antiently demiſed; and the Conſtruction that is endeavoured to be put upon it, would carry the Reſervation to be ſeveral, further than any Caſe has as yet done; The Lands paſs by this Deed all during the Life of the Leſſor, and therefore is one Reſervation ſingly of all the Rents for all the Lands: Theſe Manors reſerving therefore ſeveral Rents, will not be good for a demiſe of them where they were uſually let ſingle or together; and the calling them reſpective, antient, and accuſtomable Rents, is denoting what they were, not what they were reſerv'd and uſed. *Dyer* 309. *Hob.* 303. and *Moore* 201. 'Tis true, the ſeveral antient Rents are reſerved, but not for the ſeveral antient Tenants; and (reſpective) only denotes, but does not reſerve: Therefore I am of Opinion the Demiſe, tho' ſeveral and not joint, yet can't be made any other ſeveralty than the Demiſe: and that won't do the Plaintiff's turn, for that will be for all the Lands; and that will be *Omn*

and

How the ſeverance ought to be.

Not here ſaid, as antiently demis'd.

Here is only one Reſervation ſingly of all the Rents for all the Lands.

Here is only a denoting that they were antient Rents, *&c.*

(Reſpective Rents) only denotes, but does not reſerve.

nd *Apree*'s Caſe, and ſo let in a Manor ever let before; here are more Lands han antiently let: You won't ſay, that he Rent was not reſerved as well for the Lands not antiently demiſed, for the Lands did paſs as much as to their *redditus*, is for all that is leaſed; and that part hat was not antiently demiſed, being muſt be apportioned, for there is no Covenant for the Leſſee to pay the anti- nt Rent for the old Lands, in caſe the ther ſhould be evicted; therefore agree- ble to common Right, againſt which the Power is made, and to what was then ntended by the Settlement, the Leaſe not being ſeverally, much leſs ſingly: The eneral Courſe has been in executing of heſe Powers to make the Deeds or Leaſes n particular Terms, and not according o the general Words thereof: And now ince that when theſe Powers have been erhaps, and I believe, much antienter han the Statutes for enabling Eccleſia- tical Perſons, this was the firſt at- empt that ever was made to delegate the Power generally, as I may ſay, that was particularly to be executed in the ſame manner as they were done before; and or that it would be fatal to all Remain- er-Men, becauſe the Tenant for Life night upon a ſudden at any Time make Diſpoſition of the whole Eſtate in this

Here are more Lands than antiently let.

The *Redditus* is for all that is leaſed.

The Courſe was to make ſuch Leaſes in particular Terms, and not according to the general Words.

This the firſt Attempt to delegate the Power generally, that was particularly to be executed. And ſo fatal to Remainder-Men, &c.

uncertain manner; and being a new Invention in derogation of the Common Law, and tending to introduce Perjury, Forgery, and Fraud, the Courts of Equity won't aid it by any means; 'tis to be utterly exploded like the attempt of Justice *Richill* mention'd in *Littleton*. I am of Opinion it is not a good Leaſe, ſo as to bind the Remainder-Man. And accordingly decreed, Sir *John Hobart* ſhould be Truſtee for the Uſes in the Settlement, permit his Name to be uſed, and decreed an Accompt for the mortgaged Eſtate; and if the Party ſets up a Title to the Inheritance and Mortgage, he muſt accompt for the whole Profit as the Counſel for the Defendant inſiſted on. But the Lord Keeper decreed only an Accompt, and if the Accompt were delay'd, that a Receiver be appointed; refus'd to ſpeed the Report upon the Face of the Decree, becauſe 'tis preſum'd all Perſons will obey. Then it was mov'd That for the Sum of 8000 *l.* devis'd by old Earl *Charles* to Lady *Gerrard*, and by her devis'd to young Earl *Charles*, who devis'd the ſame to the Defendants, Intereſt might be diſcompted for the ſame by the Plaintiff, as Adminiſtrator to Earl *Fitton*, for the time Earl *Fitton* enjoy'd the Eſtate. But to this the Keeper answered, That Earl *Charles* the younger having

And the Court of Equity will not aid it. And concludes it is not a good Leaſe.

The Decree for an accompt of the mortgag'd Eſtate.

Motion to diſcount Intereſt for the 8000 *l.*

Reſpond.

aving the Fee-ſimple in Reverſion, and he Fee being fallen now into the Party who was to have that Money, ſhall he ot have it out of the Eſtate? For it is not erſonally due on Earl *Fitton*; it is too ard to give Intereſt for it to you that ave the Fee, the ſame being a Perſonal Demand of *Atwood*. *Thomas*'s Caſe in the Houſe of Lords was the ſame; ſhe recoered her Portion after the Fee had fallen n to her: The Keeper ſaid, That was beauſe of Fraud in the Truſtees, it may be, nd ſo would not decree any Intereſt for , but that all Writings, except ſuch as oncerned the Mortgag'd Eſtate, to be elivered up, and thoſe when the Poſſeſſion omes to the Defendant by *Brent* Admiiſtrator of *Charlote*; And decreed Coſts or the 4000 *l.* only, as Mortgagees uſuly have.

Writings to be delivered up, and Coſts for the 4000*l.* only.

Mich. 6° Annæ Reginæ in Canc.

Attorney General at the Relation of the Maſters and Fellows of *Sidney* College in *Cambridge*

Verſus

---- *Baines* and *Mary* his Wife, Heir of Doctor *Johnſon*.

A Will written by the Teſtator himſelf had no Witneſſes, tho' a Codicil referring thereto had 4 Witneſſes, yet held no good Will for Freehold Lands, &c.

DOctor *Johnſon* ſeized of ſeveral Freehold and Copyhold Lands, and poſſeſſed likewiſe of divers Leaſehold Lands, ſurrenders the Copyhold to the Uſe of his laſt Will, and after makes his Will in Writing, whereby he deviſes all his Eſtate both Freehold, Copyhold and Leaſehold to Truſtees, their Executors, *&c.* in Truſt for the maintaining and providing for ſeveral poor Scholars of that College, and for divers other Charities in his Will particularly expreſſed and directed: This Will was written all with his own Hand, but had no Witneſſes to it; he afterwards makes a Codicil, wherein he recites and takes

takes notice of the Will; and this Codicil was ſubſcribed by four Witneſſes, and duely executed, and ſoon after dies; and now this Bill was brought to have the Truſtees take upon them the Truſts, and to have a ſpecifick Performance thereof; and it was urged in Support of the Charities, that for the Copyhold there was no Queſtion but the Will was ſufficient, becauſe they did not paſs by the Will, but by the Surrender; for as Copyhold they could not paſs by the Will; and for the Leaſehold Lands they being but Chattels are part of the perſonal Eſtate, and not within the Statute of Frauds and Perjuries, but remain at the Common Law; and for them the Will is effectual likewiſe; and for the Freehold, tho' the Will be not effectual, as a Will, to paſs them within the Statute of Frauds and Perjuries, for want of conforming to the Circumſtances required by the Statute, yet 'tis good as an Appointment to charitable Uſes within the Statute of 43 *Eliz.* And it was compared to 11 *Co. Magdalen* College Caſe, where Want of Livery or Attornement ſhall be ſupplied, being but Circumſtances concurring to perfect the Grant and Intent of the Diſpoſer of Lands; but where there is a Defect of Power, there the Statute for Confirmation of Grants will not ſup-

Copyholds.

V. 2 Chan. Caſes 49.

Leaſeholds.

Freeholds.

Charitable Uſes.

V. 1 Chan. Caſes, 267.

ply that, as by a Feme Covert, or Infant; ſo if Tenant by Knight's Service deviſe the whole, there is a Defect of Power for a third part, tho' *Colliſon*'s Caſe in *Hob.* and *Moore* before 32 and 34 *H.* 8. ſeems contrary. Mr. *How* likewiſe ſaid, that 43 *Eliz.* co-operating with the Will makes it good as an Appointment, and cited 2 *Roll. Rep.* 318. and that that Statute controuls the Statute of *Weſtminſter* 2. *de donis conditionalibus*, and cited a Caſe *inter Dey* and *Thwaites* at the Rolls about 20 Years ago.

Sir *Thomas Powis* for the Defendant urged, that the Will not being executed as the Statute of Frauds and Perjuries directs, would not be good to paſs the Freehold Lands, and the taking Notice of the Will in the Codicil can't mend it, for that, for ought appears, it might be executed in another Room, and the Witneſſes to that ſee or know nothing of the Will; and *Colliſon*'s Caſe of the Infant comes full up to this Caſe, though the principal Caſe there does not, and ſo does the Caſe of Socage Lands, (as I think it was put of Socage Lands) and tho' 43 *Eliz.* makes void the Statute *de donis*, ſo that if Tenant in Tail deviſes his Lands to a Charity, this ſhall be good as an Appointment, though not

s a Deviſe within that Statute of Frauds
nd Perjuries, which being a ſubſequent
Statute to that of 43 *Eliz.* over-rules it,
nd ſays, that no Deviſe or Bequeſt of
Lands ſhall be good without ſuch Publi-
ation and Circumſtances as the Act re-
uires; and this Statute was made to
revent Men's diſinheriting their Heirs,
no' it were for a Charity, unleſs the So-
emnity and Circumſtances required there-
y were purſued, and that it ought not
o operate as a Diſpoſition or Appoint-
ent againſt the Statute.

Vernon on the ſame Side agreed, that
3 *Eliz.* repealed the Statute *de donis*,
eing ſubſequent to it, and as that did,
muſt 29 *Car.* 2. repeal 43 *Eliz.* being
bſequent to it; for that diſables Perſons
om giving away their Lands without
ch and ſuch Circumſtances, or to can-
l or revoke a Will without ſuch ſolemn
eremonies, and ſays, any Law, Cu-
om, or Uſage to the contrary, which
nds more ſtrongly.

Pauncefort on the ſame Side and to the
ne Effect, that 43 *Eliz.* ſhould give
ce to 29 *Car.* this being ſubſequent,
d made to prevent Perjuries and other
ſchiefs by diſinheriting Heirs.

Dobbins in Reply for the Plaintiff, that Reply.
Will is not to be void by 29 *Car.* 2.
only the Deviſe, that ſhall be void as

a

a Deviſe, but yet it may be good as a
Appointment: Neither is the whole Wi
to be void, but only the Deviſe of Land
where the Statute is not purſued: An
he inſiſted farther, that the Codicil t
king Notice of the Will, and being du
executed, that makes the Will good a
ſo, if it was affixed to the Will; and th
laying it in another place ſignifies no
thing, nor is it to be regarded, for
ſhould relate to the Will, tho' he had
perſonally in his Cuſtody.

The Attorney General cited *Colliſon*
Caſe, which he ſaid they had not anſwe
ed; that it was good as an Appointmen
and he ſaid the Statute of 29 *Car.*
might operate upon former Statutes f
Wills, but cou'd not when they were n
Wills, but Appointments only.

Curia. The Lord Chancellor held this a ve
good Diſtinction, and ſaid it was fou
out to ſupport Charity before 29 *Car.*
but now upon that Statute can this, n
being good as a Will, operate and
good as an Appointment? He agreed t
Court would favour Charities, but
could not give a Looſe to break in up
the Statute, and make Wills, which
often made *in extremis*, to be good
gainſt the Heir, when there was a S
tute to prevent them: and the Stat
never intended to diſinherit the Heir up
ſu

uch a Diſtinction; and as upon the Sta-ute *de donis*, a Will by Tenant in Tail n't be good as a Will, but yet by 43 *liz.* ſhall be good as an Appointment: o now this Statute of 29 *Car.* 2. ſays ſhall be void to all Intents and Pur-oſes, if the Circumſtances required by at Statute are not purſued; *ergo* it can-ot be good as an Appointment; but it eing a favourable Caſe on the one Side, nd a Charity on the other, he would onſider farther of it, and would confer ith the Judges in it.

Hill. 6° Annæ Reginæ in Canc.

Hyde verſus *Hyde.*

A Man makes his Will in Writing, and thereby gives all his real and per-nal Eſtate to his Wife, her Heirs, Exe-tors, *&c.* in Truſt to pay his Debts d Legacies, and he deviſes ſeveral Le-cies to his Children and other Perſons, d concludes, In witneſs whereof I have this my laſt Will and Teſtament, con-ining Nine Sheets of Paper, and to a uplicate thereof, to be left in the Hands ſuch a one, ſet my Seal in the Pre-ſence

A Will in 9 Sheets ſealed &c. by the Teſtator, who intending a new Will ſign'd a Draught thereof, and then tears off 8 Seals from the former, yet held good for the real Eſtate, and the other for the perſonal,

ſence of three Witneſſes, who all ſub
ſcribed their Names in due Form of Law
Afterwards the Teſtator being minded to
add other Truſtees to his Wife, and make
ſome little Alterations in his Will, ſend
for a Scrivener, and gives him Direction
to prepare a Draught of Inſtructions for
another Will, which the Scrivener did
accordingly, and brings the Paper of In
ſtructions to the Teſtator, which he read
over and approved very well, and ſet
his Hand to it, and being at a Tavern
thinking he now had made a new Will
he pulls out of his Pocket the firſt Will
and tears off the Seals from the firſt Eight
Sheets, which the Scrivener ſeeing aſk
him, " What he was doing? Why (ſay
" he) I am cancelling my firſt Will
" Pray (ſays the Scrivener) hold your
" Hand, the other Will is not perfected
" 'twill not paſs your real Eſtate for
" Want of being ſubſcribed and executed
" purſuant to the Statute of Frauds and
" Perjuries: Say you ſo (ſays the Teſta
" tor) I am ſorry for that "; and imme
diately deſiſted from tearing off any more
of the Seals, and in ſome ſhort Time af
ter dies, without having done any fur
ther Act to perfect the ſecond Will, or
cancel the firſt. After his Death, an
Application to the Spiritual Court by the
Wife, who was made Executrix of the

ſt Will, they ſentenced it a good Will
s to the perſonal Eſtate, and admitted Pro Quer.
er to prove it: And now this Bill was
rought by the Legatees againſt the Wife
nd other Truſtees to have a ſpecifick
erformance of the Truſt in the firſt Will,
nd that the Eſtate might be ſold purſu-
nt to the Directions of that Will, and
eir Legacies be paid them: It was in- Pro Def.
ſted, that that Will was revoked by
aking the other, and that the other,
o' there were the ſame Legacies given
ut of the Lands thereby deviſed to be
ld, was not ſufficient to paſs the real
ſtate, or make any Charge upon it, for
ant of the Circumſtances required by
e Statute of Frauds and Perjuries.

Sir *Joſeph Jekyll* urged, that the laſt
eet of the firſt Will was avoided by
e tearing off the Seals from the Eight
ſt Sheets; for when in the laſt Sheets
refers the Execution of it, as his Will,
his Sealing of every Sheet, as the Sig-
l or Teſtimonial of its being his laſt
ill; if any of theſe Signals fail or are
ſtroy'd, the whole Will becomes void;
d here he has torn off Eight of the
ls; beſides the Statute of Frauds and
juries having four Words, *viz.* Burn-
, Cancelling, Tearing, or Obliterat-
, and that by any of theſe the firſt
l is to be avoided, here are two of
thoſe

thoſe Acts, for here is Tearing and Cancelling, and ſo the firſt Will is defeated and avoided.

Pro Quer. Mr. *Comper* on the other Side inſiſted that tho' the Original Will ſhall by this Act be ſuppoſed to be cancelled, yet here being no *Animus Cancellandi* or *Revocandi* and that as ſoon as he was told of it he deſiſted and went no farther, that the Duplicate thereof, which he took notice of in his Will, remaining intire and undefac'd in the Hands of the Party, to whom it was delivered, ſhall be ſufficient to paſs the real Eſtate.

Mr. *Williams* on the ſame Side inſiſted that it ſhould be only a Revocation *pro tanto*, for ſo much as the Seals were torn off from, and no more, and that for the laſt Sheet it ſhould remain a good Will for a Man may revoke Part of his Will if he pleaſes, and yet the reſt ſtand good. And Mr. *Gilbert* ſaid, that ſealing of all the Sheets was not eſſentially neceſſary to the Perfection of the Will, but only to the laſt Sheet, and that it remains intire and abſolutely perfect and executed and that he had not any Intention of cancelling the Will; for that when he was told of the Conſequence he deſiſted and the laſt Will was only eſſential for the making the Will remain intire, and therefore can't be ſaid to be cancelled, but ſhall

all be good and eſſential to all Intents
d Purpoſes, the eſſential Part which
akes a Will ſtill remaining.

Serjeant *Hooper* cited a Caſe in C. B.
nce the Revolution, where a Man made
s Will in due Form, and after made
nother Will, whereby he revoked the
ſt Will, but the laſt Will had but Two
itneſſes, and it was adjudged no Re-
cation, for that Statute was made on
rpoſe to take away all Conſtructions
a Man's Intentions, where the Form
the Statute was not exactly purſued:
t my Lord Chancellor wondred how Curia.
at cou'd come to be the Queſtion, and
ought he was miſtaken, ſince the Sta-
e is expreſs that no Will ſhall be re-
ked by a ſubſequent Will, unleſs ſuch
bſequent Will be ſigned and atteſted by
ee or more Witneſſes; and in the prin-
al Caſe he decreed this tearing off the
ght Sheets the Seals to be no cancel-
g of his firſt Will, not being done
imo cancellandi; as ſoon as he was told
it that the other wou'd not be ſuffi-
nt to paſs his real Eſtate, he imme- The latter
tely deſiſted, and left the laſt Sheet Declaration
ire and uncancelled; and took this Dif- in Writing, a
ence, that for the whole perſonal ſufficient Re-
ate this making of the ſecond Will vocation of
s a ſufficient Revocation of the firſt the former
toto, and that it ſhould not be taken Will as to
the perſonal
Eſtate.

to be a good Will as to part of the perſonal Eſtate, and no Will or Revocation as to the other part of the perſonal Eſtate for his Intention ſhould not be taken by halves; and ſince the Spiritual Court has ſentenced it a good Will of the perſonal Eſtate, it muſt be good for the whole and ſuch Legatees of the Perſonalties in the firſt Will as are left out in the ſecond muſt loſe their Legacies, but for thoſe that had Legacies by the firſt Will chargeable upon the real Eſtate, if the ſame Legacies were deviſed to them by the ſecond Will, that they ſhould ſtill continue chargeable on the real Eſtate and ſhould be raiſed out of it: And ſo he ſaid it would be, whether their Legacies were increaſed or diminiſhed, they being by the ſecond Will made chargeable upon, and to be raiſed out of, the real Eſtate likewiſe, which though it was not ſufficient to charge the real Eſtate in itſelf, yet ſince the real Eſtate remained well deviſed by the firſt Will, they ſhould be ſtill ſecured by that real Eſtate for they were not out of Lands like Rent, but only ſecured by Land, which he ſaid was well deviſed, but for other new abſolute perſonal Legacies deviſed by the laſt Will, they ſhould be chargeable only upon the perſonal Eſtate, and ſhould have the Preference to be firſt paid

Note.

ut of the perſonal Eſtate before the other egacies in the firſt Will upon the real ſtate, becauſe they had their ſeveral unds out of which they were to be paid, e perſonal Legacies in the laſt Will, out f the perſonal Eſtate, which was well eviſed by that Will; and the Legacies harged upon, or ſecured upon the real ſtate, which was well deviſed by the rſt Will, out of the real Eſtate; and all greed, That the ſecond Will, tho' not aled and ſubſcribed, as the Statute of rauds and Perjuries directs; yet 'tis good r the perſonal Eſtate, it being *caſus omiſ-* out of the Statute, and then it was ood at Common Law.

Paſch. 7° Annæ Reginæ, in Canc'.

Wallis verſus *Everard.*

Bill upon three demands diſmiſſed as to two, and relieved for the other, where Bond and other Debts had been paid by an Adminiſtratrix for the Honour of the Family, and other Allowances made to her.

PLaintiff, as Adminiſtratrix to her Huſband, brought a Bill upon three Demands; the firſt for 500 *l.* which ſhe paid upon Bond-Debts of her Husband's over and above his Aſſets; the ſecond for 120 *l.* due by the Defendant upon a Note; the third for her Dower or Thirds out of the real Eſtate. The Caſe was ſhortly thus:

The Plaintiff's Inteſtate, upon purchaſing an Eſtate in Fee, wanting Money to compleat the Purchaſe, borrowed of ſeveral Perſons 500 *l.* and gave Bonds for repayment with Intereſt: But before theſe Bonds were ſatisfied, died inteſtate, leaving the Plaintiff, his Widow, and one *John Everard* his Son, a Minor of about two or three Years old: The Plaintiff took out Letters of Adminiſtration to her Husband, and exhibited an Inventory, in the Spiritual Court, of his perſonal Eſtate, which falling much ſhort to pay his Debts, the Plaintiff, for the Honour of the Family, and to prevent the Creditors ſuing the Infant, paid thoſe Bond-Debts, intending to have them allowed out of the real Eſtate when the Infant came of Age. The Plaintiff likewiſe, as Guardian to her Son, entred upon the real Eſtate, and received the Rents and Profits thereof for about ſixteen Years, when he died, ſtill under Age, and the Eſtate thereupon deſcended to the Defendant as Couſin and Heir at Law, againſt whom ſhe now brought this Bill, to have a Satisfaction out of the real Eſtate for what ſhe paid over and above her Husband's Aſſets: And for the 120 *l.* which ſhe had brought to the Accompt of her Husband's perſonal Aſſets, and for her Dowry: As to the Dower, the Bill was diſmiſſed without much difficulty, becauſe ſhe

ſhe had her remedy at Law; and as to the 120*l.* 'twas denied to be due; and if ſo, then ſince ſhe ought to be diſcharged of ſo much of her Husband's Aſſets, though brought to accompt in the Inventory, the Bill was diſmiſs'd as to that likewiſe; but as to the firſt Point, 'twas inſiſted for the Plaintiff, That ſhe ſtood in the place of the Creditors; and as they for want of perſonal Aſſets might have fallen upon the real Eſtate for Satisfaction of their Bonds; ſo now ſhe having paid them, ſtood in their place, and had the ſame Equity as they would have had. For the Defendants it was inſiſted, That the Plaintiff's Bill ought to be diſmiſſed likewiſe as to this part, being very extraordinary; for upon payment ſhe might have taken an Aſſignment of the Bonds; as is uſual in ſuch Caſes, and have ſued them in the Creditors Names at Law. Pro Quer. Pro Def.

2*dly.* It was ſaid, That ſhe received the Rents and Profits as Guardian to her Son for 16 Years, and would now ſink all that and burthen the real Eſtate with the whole Debts.

3*dly.* That the Creditors themſelves could have no effect of their Bonds till the Infant had come of Age, by reaſon, if they had ſued him, the Parol would have demurred till his full Age; and therefore he was not at all obliged to pay thoſe

Bonds, and ſo it was paid in her own Wrong.

Pro Quer. Thereupon the Plaintiff's Counſel urged, That the Eſtate was not worth above 33 *l. per Annum*, and that her Dower of it came to 11 *l. per Annum*, and that ſhe ought to be allowed 14 *l. per Annum* at leaſt for the Maintenance of her Son, and then the Reſidue which ſhe received would not near amount to ſatisfie what ſhe had paid; and tho' the parol would have demurred 'till the Infant's full Age in ſtrictneſs of Law, yet it was for the Honour of the Family to have thoſe Debts ſatisfied ſooner, and therefore ſhe ought to be allowed them.

Curia. My Lord Chancellor ſaid the parol Demurrer was no Diſcharge of the Debt, it was only a Compoſition of the Infant, that he ſhould not be haraſſed with Suits before he was of Age to know how to defend them, and that the Debt was nevertheleſs ſubſiſting; and decreed an Accompt to be taken of the perſonal Aſſets of the Husband, and to ſee how it had been applied, and how far it fell ſhort; and likewiſe an Accompt of what the Plaintiff had received of the Rents and Profits of the real Eſtate, allowing her upon the Accompt what was reaſonable for Maintenance of the Infant, and what ſhe had paid on the Bonds for the Honour

of the Family, and then to reſort back to the Court, and for Coſts, *&c.* to ſtand revived 'till an Accompt taken, tho' the Defendant urged this Accompt might be at the Peril of Coſts on the Plaintiff's Side.

Paſch. 7° Annæ Reginæ, in Canc.

Strickland verſus *Hudſon, Maſon, & Ux.*

Legacies deviſ'd to 3 Children decreed to be paid to the Father on his entring into Recogn. with one S. One of the Children dies; the Father dies inſolvent; the Recognizance is ſued againſt S who, as A's Repreſentative, brings his Bill againſt the other 2 Children to have Allowance for their Maintenance, *&c.*

THE Caſe was, that one *John Lodge* having one Son and the two Defendants his Daughters, their Uncle by Will gave them 50 *l.* a-piece, and if any of them died, their Share to go to the Survivors and Survivor equally, and limited no Time either for Payment of theſe Legacies, or within what Time the Death of any ſhould intitle the Survivors, and died; the Children being all under Age, their Father, as next Friend and Guardian, brought his Bill in this Court againſt the Uncle's Executors to have the Portions paid him upon giving Security, which was decreed accordingly, and thereupon he and the now Plaintiff *Strickland* entered into a Recognizance before a Maſter of this Court of 300 *l.* Penalty, the

* See S. Kin. 408. 409. 410.

the Condition whereof (after reciting the Decree, and that the Children, by Reaſon of their being under Age, were not capable of giving Diſcharges for their Legacies) was, that if the Conuſors or either of them ſhould pay the ſaid 50 *l.* a-piece to the Children at their reſpective Ages of twenty one Years, then the ſaid Recognizance to be void: The Father after puts out the Son Apprentice, but, as was prov'd, gave no Money with him; the Son lived Nine or Ten Years after he came out of his Time, and then died inteſtate; the Defendants intermarried, and ſome Time after the Father died inſolvent, without ever having paid the Portions or the Intereſts thereof, and the Recognizance being now put in Suit againſt the Plaintiff, the other Conuſor, he brought this Bill to be relieved, and inſiſted, that the Father being dead he now ſtood in his Place, and ought to have the ſame Equity againſt the Defendant as the Father would have had; that the Father had maintained the Defendants for ſeveral Years in their Minority; that neither they before, nor their Husbands after, Marriage had ever demanded of the Father their Legacies, and therefore no Intereſt ought to be paid for them; and for the Principal, that it ought to go towards Satisfaction of their Board and

Pro Quer.

and Maintenance, and in particular for a Year's Board after Marriage, and when their Husbands were obliged by Law to maintain them; and for the Son's Legacy, it did not belong to them, but to his Repreſentatives; for tho' no Time was limited when theſe Legacies were to be paid, yet the Law would ſupply a Time, and give it them when they were capable of having any Benefit by it, or were in ſuch Circumſtances as to require it; and the Son being put out Apprentice, and his living ſo long after he came out of his Time, his Legacy was veſted in him, and ought not to ſurvive, but to go to his Repreſentatives.

For the Defendants 'twas anſwered and proved, That they did all the Work of the Houſe as their Father's Servants, and that he kept no other, and their Service was more worth than the Intereſt of their Legacies; and therefore no Deduction ought to be upon that Account; that the Father was bound by the Laws of Nature and of the Land to maintain his Children in their Minority, and their Portions given them by a Stranger ought not to be leſſened upon that Account; that for the Year's Board after Marriage, it was by expreſs Agreement, and was all they were to have from their Father; and for their Brother's Legacy, admitting it Pro Def.

did veſt in him, and ſo belonged to his Repreſentatives, yet it being by the Will to the Survivors generally without any Times limited, whenever he died, his Repreſentatives would be but Truſtees in Equity for them.

Curia. *Cur.* You need not urge this laſt Point for it was expreſly limited by the Condition of the Recognizance to be paid at twenty one Years of Age, which he attained to, and ſo it belongs to his Repreſentatives, and 'tis not now upon the Foot of the Will, but of the Recognizance; as to the other Legacies they muſt be paid with Intereſt and Coſts, for their not demanding them was no Diſcharge of them, for they were tender of troubling their Father, but ought not therefore to be Loſers; and he ſaid, that for this Reaſon the Maſter of the Rolls, who had longer Experience than himſelf, would never allow a Child's Legacy to be paid to the Father or Mother upon any Security whatever, by Reaſon of the Strife and Diſpute it might occaſion in a Family; and for the Maintenance of them in their Minority, the Father was bound to do it, and their Portions given by a Stranger are Nothing to him more than if they had not any; and for the Intereſt of them, their Service was more worth, and therefore they are to have Intereſt;

V. 2 Chan. Caſes. 79.

See acc. 1 Bro. Cha. Cas. 307.

but

but for the Year's Board after Marriage the Plaintiff muſt be allowed, the Proof not being full as to the Agreement.

Ter. Trinit. 7° Annæ Reginæ in Canc.

Litton Strode, aliàs *Litton*, verſus *Lady Falkland* & al'.

1. Ch. R. Fern. 62. 1. Brow. Parl. Cas. 229.

THE Caſe was this, Sir *Rowland Litton* had Iſſue by *Judith*, his firſt Wife, *William*, afterwards Sir *William Litton*, *Rowland*, and *Anne* who was married to Sir *George Strode*, and *Mary* who was married to Sir *Francis Ruſſell*; and had Iſſue by *Rebecca*, his ſecond Wife, the preſent Counteſs of *Falkland*; and on the 20th of *February*, 1665, by Indenture and Fine on the Marriage of *William*, his eldeſt Son, with *Mary Harriſon*, ſettles his Eſtate in *Hertfordſhire* in this Manner, viz. As to part to the Uſe of *William* for Life, Remainder to *Mary* his Wife for Life for her Jointure, Remainder to *William* in Special and general Tail, Remainder to Sir *Rowland* in Fee; and as to the other part to Sir *Rowland* for Life, Remainder to *William* for Life, then to Truſtees, during

Divers Settlements made on Marriage, &c. by the Anceſtor, *Quære* how far controulable by a ſubſequent Will made by the Heir? And ſuch Wills expounded.

ring his Life, to ſupport the Remai
ders to his firſt and other Sons in Ta
Male by any other Woman, Remainde
to Sir *Rowland* in Tail Male, Remainde
to the right Heirs of Sir *Rowland*; an
as to the Reſidue, to the Uſe of Sir *Ro*
land during his Life, Remainder to *Wi*
liam in ſpecial Tail Male, Remainder t
Sir *Rowland* in Tail Male, Remainder t
the right Heirs of Sir *Rowland*: And a
terwards by Indenture and Fine for ba
ring the ſeveral Eſtates Tail, limited
Remainder to Sir *Rowland* by the pr
ceding Deed, he ſettles and conveys a
thoſe Lands to the Uſe of himſelf f
Life, and after his Death, and after t
reſpective Uſes and Eſtates precedent
the Eſtates Tail therein limited to S
Rowland ſhould determine, to the Uſe
Sir *Francis Ruſſell* and Sir *Nicholas Stro*
and their Heirs, in Truſt to permit *Ro*
land Litton, his younger Son, to take t
Profits during his Life, and after in Tru
for his firſt and other Sons in Tail Ma
ſucceſſively, then in Truſt for ſuch Pe
ſons and Eſtates as Sir *Rowland* ſhould b
Deed or Will appoint, and in Defau
thereof in Truſt for the right Heirs
Sir *Rowland*: And afterwards by Lea
and Releaſe Sir *Rowland* conveys Lan
in *Hertfordſhire* and *Bedfordſhire* to S
Francis Ruſſell and Sir *Nicholas Strode* a

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their Heirs, to the Uſes and Truſts following, *viz.* As to thoſe in *Hertfordſhire*, to the Uſe of Sir *Rowland* for Life, then in Truſt to and for the Uſe of *Rowland* the Son for 99 Years, if he ſhould ſo long live, then to Truſtees during his Life, then in Truſt and for the Uſe of *Rowland*'s firſt and other Sons in Tail Male, Remainder to the right Heir of Sir *Rowland*; and as to thoſe in *Bedfordſhire*, to the Uſe of Sir *Rowland* for Life, Remainder to *Rowland*, &c. (as the other) then in Truſt to and for the Uſe of the right Heirs of Sir *Rowland*. *Rowland* the Son dies without Iſſue in the Life of Sir *Rowland*, who after, in 1674, died likewiſe: Then *William*, now Sir *William Litton*, by Will in Writing, deviſes part of the Lands compriſed in the Settlement of 5 to Dame *Philippa*, his Wife, for her Life; and then comes this Clauſe, And all other my Lands, Tenements and Hereditaments (*out of Settlement*) I give and deviſe to *Litton Strode*, (the now Plaintiff) Son of Sir *George Strode*, and his Heirs, upon Condition, that if I leave any Daughters by my Wife, or that ſhe be inſeint at my Death, and after delivered of any Daughter or Daughters, that he ſhall pay four thouſand Pounds to ſuch Daughter or Daughters; and alſo upon this expreſs Condition, that he ſhall change his

his Name from *Strode* to *Litton*, and writ his Surname *Litton* to all Deeds, *&c.* an if he does not, *&c.* then to go over t the Lady *Ruſſell* and her Heirs; and make him and Dame *Philippa* his Executors an reſiduary Legatees: After making thi Will Sir *William* forecloſes the Equity o Redemption of ſeveral Mortgages, an purchaſes ſeveral other Lands of Inher tance, and was alſo at the Time of ma king his Will ſeized of divers Copyhol Lands not ſurrendred to the Uſe of hi Will; afterwards Sir *William* adds tw Codicils, which he wills ſhould be an nexed to his Will, and thereby give ſome particular Legacies to other Pe ſons, and both Codicils had three Wit neſſes a-piece, but were not annexed t his Will, that being in the Country, an the next Day Sir *William* dies without I ſue; and now the Plaintiff *Litton, alia Strode*, brought this Bill to have a Diſco very of the Deed and Writings, and t have the Lands, whereof the Uſes wer determined as given to him by Sir *Willia Litton*'s Will, and an Accompt of th Profits, and that the Will might be eſta bliſhed and proved by Witneſſes *in perp tuam rei Memoriam*; and what Lands pa ſed by this Will was the principal Poin in Queſtion.

The Court agreed in this Caſe, tha

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here was no part of the Eſtate ſo ſettled, ut that it would take Effect in Poſſeſſion fter Sir *William*'s Death, if he died with- ut a Son, as in Fact he did.

It was argued for the Defendant by ir *Thomas Powis*, that the Condition be- g only that the Plaintiff ſhould change s Name, and not that he and his Heirs ould do it, the perſonal Eſtate, which as more than 20000 *l.* was a ſuffici- nt Conſideration; and as to the Words emſelves, And all other my Lands, enements and Hereditaments (*out of Set-ment*) 'tis very plain they are Words Deſcription what Lands he intended ould paſs, and to take in any that were Settlement would be totally to extin- iſh and reject thoſe Words, which are peated Three Times in the Will to ſhew s great Care not to break in upon any ttlement, and therefore are not to be oked upon as unwary accidental Ex- eſſions; and ſaid he believed 'twas a perſtitious Notion that a great many ople had entertained, that a Man cou'd t diſpoſe of an Eſtate which came from Anceſtors, but ought to let it go to Heirs as it came to him, tho' Lands his own acquiring he might do what would with them; and this ſeems to the Intention of this Will, that he uld not meddle with any of the Lands which

which were ſettled by his Father, and came to him by Conveyance from his Father; for the Words are to be taken to diſtinguiſh the Lands, and not the Eſtate in the Lands, and the Words operate up on both, *viz.* Thoſe he had out of Set tlement were to paſs, and thoſe in Set tlement not to paſs; as to the 4000 which is made part of the Condition o the Plaintiff's taking, 'twas very fit tha when Sir *William* gave away ſo great a Eſtate, that he ſhould charge it with Fortune for his Daughters if he had any and this was more proper for her tha the Land itſelf; for if ſhe died before ſh came of Age to ſettle it, it would hav gone away from her Husband (ſo h would have Nothing with her) to Si *William*'s Three Siſters, as Heirs of Si *Rowland*, tho' the Lady *Falkland* were bu of the half Blood, becauſe there was n *poſſeſſio fratris* in Sir *William*, he havin Poſſeſſion of the Eſtates Tail only; an the Words *out of Settlement* are very ma terial, for if they had not been in Settle ment at all, or as the other Side woul have them to be uſeleſs Words, and n no Force at all, becauſe of the old Re mainder in Fee, they would have gone t the Heirs of Sir *William* only, but th Settlement being ſtill in Force, which h would not diſturb, they will go as the ough

ught to have done: As to the Caſe of ooke and *Gerard*, 1 *Saund.* he ſaid, there e had no other Lands but what were ttled or deviſed.

Sir *Joſeph Jekyll* on the ſame Side ſaid, he Words were to be taken, all his ands not compriſed in any Settlement f that Family, and not all that he had Power to diſpoſe of, which would be ry impertinent; for if he deviſes all, e deviſes all that he has a Power to de-iſe, and then to ſay all that he had a ower is impertinent; beſides theſe Lands, hich were about 2000 *l. per Annum*, were ctually in Settlement at the Time of aking the Will; for he was then Te-nt for Life, Remainder to himſelf in ail Male by *Mary*, Remainder to him-lf in Tail Male general; and therefore e Reverſion which he had would not ake it good, for that took Effect only his Death, and the Words are to be ken as they were meant at the Time of eaking them, and not to wait and ex-ct 'till his Death for a Conſtruction; to the Mortgages he ſaid they paſſed as rt of his perſonal Eſtate to the reſidu-y Legatees, and not to the Deviſee; d as to the Caſe cited by Brother *Prat* Tenants in common, no doubt but enants in common may deviſe, though yntenants cannot, and the only Que-

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ſtion there was, whether the Partition after was not a Revocation? Then they would have Evidence read to prove what was the Teſtator's Intention by theſe Words, which was oppoſed by the other Side; *viz.* Sir *Edward Northey*, who cited 5 *Co.* Lord *Cheyney*'s Caſe, 4 *Co. Vernon*'s Caſe, and *Cro. Jac.* 144. *Molineux*'s Caſe, and ſaid there could he no Averment out of the Will ſince the Statute of Frauds and Perjuries. Serjeant *Prat*, that no Parol Declaration out of Will ſhould be admitted, and ſaid he never knew it in any Caſe, unleſs ſometimes in this Court, *to prevent a reſulting Truſt*, but not where there was a plain expreſs written Will as here. Serjeant *How* cited *Bertie* and Lord *Falkland*'s Caſe in Lord Keeper *Wright*'s Time to that purpoſe, and *Dobins* ſaid, then a Nurſe, an Apothecary, Children, and every Body that attended a ſick Body, and would catch at every Thing that drops from him, at every broken Saying or Expreſſion, would be the Witneſſes. But the Court with the Aſſiſtance of the Maſter of the Rolls Lord Chief Juſtice *Trevor*, and Juſtice *Tracy*, agreed, that where the Words ſtand *in Æquilibrio*, and are ſo doubtful, that they may be taken one Way or other there 'tis proper to have Evidence read to explain them, and we will conſider how

V. 1 Chan. Caſes 197.

Curia. Evidence admitted to explain the Intent of the Teſtator in a Will.

how far it ſhall be allowed, and how far not, after 'tis read; and this is not like the Caſe of Evidence to a Jury who are eaſily byaſs'd by it, which this Court is not: And the diſtinction in *Cheney*'s Caſe well warrants the reading of Evidence, where the intent of the Teſtator is doubtful; as there, where a Man had two Sons named *John*, *&c.* which, my Lord Chancellor ſaid, differed not from this Caſe, where the Words hang in equal balance, what Settlement he intended: Then Proof being made, it appeared by ſeveral Expreſſions of the Teſtator, That he never would infringe his Father's Settlement, and that his Father was a wiſe Man, and ſettled his Eſtate as he would have it go, and therefore he would not break into any of thoſe Settlements.

After which the Counſel for the Defendant went on, and Serjeant *Parker* ſaid, It muſt be intended ſuch Lands as were not comprized in any Settlement, or ſuch as were; and yet the effect of them was quite at an End by determination of the particular Eſtates; and it was intended not to hurt thoſe, for whete the Uſes were continuing, he cou'd not deviſe away, 1 *Saund.* 170. And he obſerved that in other places of his Will, where he deviſed Rent-charges, the Words were general, [out of all his Manors, Lands, *&c.*] Pro Def.

without ſaying [out of Settlement :] And here 'tis not limited to him and the Heirs Male of his Body, but to him and his Heirs; ſo that if he ſhould have only Daughters, it would go immediately out of his Name again : Beſides, if Sir *William Litton* had a Son after making his Will, as there was the ſame probability for a Son as a Daughter, that Son would have all the Eſtate ſo ſettled in Tail; and yet the now Plainiff muſt have changed his Name, tho' he could have only had what was not ſettled: And *Cro. Car. Roſe, v. Berkley* was cited to ſhew, That admitting the Words to be *in æquilibrio*, yet there were two Things to turn the balance on their Side: *Firſt*, That they were Heir at Law, and therefore to be favoured. *2dly*. Nothing of what the Witneſſes depoſed tends to the Application of the Words, but only that he would not alter the Settlement, becauſe my Lady *Falkland* was as much his Father's Child as the others.

Jennings on the ſame Side. As to the Preamble of his Will, *viz.* And as for my Temporal Eſtate, *&c.* they are Words of courſe, and the Drawer of the Will no very skilful Perſon. As to the Codicils he ſaid, They not being annexed to the Will, could not amount to a new Publication of the Will; and therefore the

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Freehold Land, purchaſed after making the Will, could not paſs by it; neither did the Mortgages paſs to the Deviſees, but being only a Security for Money, are to be reckoned part of the Perſonal Eſtate, and ſo to belong to the reſiduary Legatees.

Lethmore on the ſame Side ſaid, The Words, *out of Settlement*, were introduced for the ſake of the Heir at Law, as well as the Words of the Deviſe were for the Deviſee.

Sir *Simon Harcourt* on the ſame Side. Suppoſe the Words had been, All my Lands under Settlement, then no doubt they have contended, That all he had Power to give ſhould have paſſed. As to the Copyhold, this Court won't ſupply the Defect of a Surrender, for a Deviſee to diſinherit the Heir at Law. As to the Mortgages, That they ſhould paſs as real Eſtate, he ſaid, was a ſtrange Doctrine in this Court, when they were not foreclоſed nor releaſed at the time of making the Will; and tho' they were ſo after, yet then 'twas in Nature of a new Purchaſe, and a new Right, and will not paſs without a new Publication.

Cowper on the ſame Side. He ſpoke only of the Evidence, that proved, That Sir *William* would not break in upon his Father's Settlement, tho' he was told my

Lady *Falkland* would come in an equa
Sharer with her Siſters; and that he ha
ſo declared before the Will, at the tim
of the Will made, and after to the ver
time of his Death.

Williams. Suppoſe he had leaſed ſom
Lands, and had others in Poſſeſſion, an
then deviſes all his Lands out of Leaſe
ſurely thoſe in Leaſe would not have paſſe
no more will the Lands here which a
in Settlement; tho' it had been a Gra
with ſuch Words, which is a much ſtronge
Caſe: As to the Codicils, they canno
amount to a Republication, becauſe no
affix'd to the will, 1 *Ro. Ab.* 617. As
the Mortgages he ſaid, If they releaſe
the Equity of Redemption after the Wi
that would have been ſo far from paſſin
them by it, that it would have been
Revocation of the Will, the Releaſe b
ing to him and his Heirs; and when
begins [all the Meſſuages, Lands, &
which are things of an inferiour Natu
to Manors, *&c.* no Manors can paſs. 2
Arcbiſhop of *Canterbury*'s Caſe.

Mr. *How.* Where there is any U
that is ſtill executory and not execute
they are ſaid to be in Settlement, and t
ancient way of executing Remainders u
on Fines *ſur Grant & Render* was by *Sc*
facias, 24 *Ed* 30. *Co. Lit.* 184. *a.* A
here a great part of the Eſtate was

Indenture of 72 *l.* limited to the Truſtees and their Heirs, and therefore 'twas in Settlement and executory.

The other Side, who had argued firſt, (tho' by miſtake I have inſerted them laſt) viz, Sir *James Selby*, Serjeant *Prat*, Sir *Edward Northey*, Serjeant *Hooper*, Serjeant *How*, *Dobins* and *Brydges*, who all inſiſted chiefly, That the Remainder of all being limited to Sir *Rowland* and his Heirs, 'twas the old Uſe and the old Reverſion, and no new Eſtate; and therefore it was never in Settlement, but out of Settlement at making the Will, and cited *Pybus* and *Mitford*'s Caſe, and *Fenwick* and *Mitford*'s Caſe, 2 *Vent.* 286. 1 *Lev.* 212. That he had given his Wife part of the Lands comprized in the Settlement, and then ſays, All other my Lands, *&c.* out of Settlement; which muſt be intended all that he had power to give; that otherwiſe the Eſtate that would be coming to the Plaintiff, would not be a ſufficient Conſideration for changing his Name, and taking that of *Litton* upon him, which was intended ſhould be continued in the ſame Grandeur and Dignity, as it had been formerly in Sir *William*'s Family; and being chatged with 4000 *l.* to Daughters, if any ſhould be, would have reduced it to little or nothing, if the other Lands ſhould not paſs. Pro Quer.

2*dly*. That the making of Codicils, and directing they ſhould be annexed to his Will, would amount to a new Publication of his Will, tho' it was not in fact annexed; becauſe he therein took notice of his Will, and then the new purchaſed Lands would paſs.

3*dly*. That the legal Eſtate of the Mortgages paſſed by the Will, and when the Equity of Redemption was afterwards releaſed, foreclоſed or extinguiſhed, that made the Deviſe abſolute, and goes in favour of the Deviſee; and the rather, becauſe when he had it in his Power to have them Land or make them Money, he choſe to continue them as Land, and had the legal Eſtates in him to deviſe.

4*thly*. That this Court would ſupply the Defect of a Surrender of the Copyhold, being for the Advantage of a Grandchild, as they have frequently done for a Child.

The Court gave no Opinion, but ſaid, They would take time till next Term, and then they would give their Opinions: But they took Notice, that by the Deed of 72 *l*. all the Eſtates are limited to Sir *Francis Ruſſel* and Sir *Nicholas Strode*, and their Heirs in Truſt, to permit *Rowland* the Son to take the Profits during his Life, *&c*. and after in Truſt for Sir *Rowland* and his Heirs; and therefore it could not be the old Uſe in Sir *Rowland*, but a new Uſe

or Truſt; and if the Truſt to the right Heirs of Sir *Rowland* be kept in the Truſtees, then 'tis not out of Settlement: But if this Court ſhould look upon the *Ceſtui que Truſt* as executed, then 'twill be in Sir *William*, and by conſequence out of Settlement: But what Conſtruction theſe Words ſhall have, is the Queſtion, *&c.* And the Court took time to conſider of this Caſe till *Trinity* Term; when on *Wedneſday* the 17th of *June*, they all unanimouſly, *viz. Tracy*, *Trevor*, Maſter of the Rolls, and my Lord Chancellor, gave their Opinions for the Plaintiff. Firſt, Mr. Juſtice *Tracy* put the Caſe at large, before he entred upon the main and general Queſtion; he argued, That the Depoſitions read in this Caſe, ought not to be received, or to have any weight or influence in this Caſe; and ſaid, This differed not from the principal Point of my Lord *Cheney*'s Caſe, 5 *Co.* and took a difference between a void Deviſe and a doubtful and uncertain one; as if *J. S.* has ſeveral Sons, and a Deviſe is made to one of the Sons of *J. S.* this is entirely void and can never be made good; but if it be only doubtful and uncertain, it muſt receive its Conſtruction from the Words of the Will it ſelf, and no Parol Proof or Declaration ought to be admitted out of the Will to aſcertain it; for then Marriage-Settlements or Purchaſes may be defeated

Opinio Curia.

twenty Years after they are made by ſuch Parol Proof ſtarted up: But where a Man has two Sons named *John*, and deviſes to his Son *John*, without ſaying which of them he means, 'tis very conſiſtent with the Words of the Will to admit of Proof to explain which of them he intended, and the Words in the Will are not at all altered by it. And now ſince the Statute of Frauds and Perjuries this is ſtronger; becauſe by that Statute all Wills are to be in Writing, *&c.* As to the main and general Queſtion of the Caſe he held, That not only thoſe Lands of his own Purchaſe, but likewiſe all other Lands in any of the Settlements, the Uſes whereof were to determine upon his Death, or his dying without Iſſue, would paſs by this to the Plaintiff; for tho' they were comprized in the Settlement, yet the Uſes of them being determined upon his Death, they cannot be ſaid to be in Settlement; as if a Man makes a Settlement of all his Lands in ſuch a County except ſuch and ſuch particular Lands, ſurely thoſe Lands that are excepted are not in Settlement, tho' they are compriz'd or mention'd in the Deed of Settlement. And if he had intended to have given the Plaintiff only the Lands of his own Purchaſe, he would have expreſs'd it ſo; and the Defendants do admit thoſe Lands that

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were limited to *Rowland* the Son, paſſed by the Will, he being dead without Iſſue.

2*dly*. Becauſe the Inheritance, or Truſt of the Inheritance of all thoſe Lands reſulted by Law to Sir *Rowland*, as part of his old Eſtate, and the Limitation of it to the right Heirs of Sir *Rowland* was only *clauſula clericalis*, and ſignified nothing; and ſaid, There was no more reaſon why the Reverſion of thoſe which he had as Tenant in Tail, after poſſibility of Iſſue extinct, ſhould paſs; than thoſe which he had as Tenant in Tail, which determined likewiſe upon his Death without Iſſue; And his Intent here ſeems clear, That he thought he ſhould die without Iſſue; and cited *Aleyn* 28. 1 *Lev.* 212. which, he ſaid, was the Caſe almoſt *in terminis*, & 1 *Leon.* 251. *Bennet* v. *French*, & 2 *Vent.* 285. As to the Objection, That he could not deviſe thoſe that were in Settlement; and therefore the Words [out of Settlement] if they did not exclude thoſe that were in Settlement, would be void, he ſaid, The Authorities cited were a ſufficient Anſwer to it. 3 Mod. 228.

3*dly*. His Intent appears to paſs all thoſe Lands, by his deviſing Annuities to his Wife out of all his Eſtate, becauſe he doubted whether ſome part of his Eſtate might not be ſo ſettled, that it could not paſs by the Will, and conſequently the An-

Annuities not take place out of them and therefore he charged his whole Estat with thoſe Annuities.

4*thly*. The Circumſtances of this will prove his Intent to paſs them, as by increaſing his Wife's Jointure, continuing his Name and Blood, which could not he intended without ſupporting it to the Grandeur, Dignity, and Honour he himſelf had lived in; and that it was not mited to the Heirs Male of the Plaintiff was the unadviſedneſs of the Attorney that drew it to omit, for no doubt it was in the Intention of the Teſtator: Beſides his deviſing part of the Lands ſettled on his Wife; and then ſaying afterwards And all other my Lands, *&c.* ſhews that he intended all the other Lands which he had in his power to deviſe: His giving the 4000 *l.* to any after-born Daughter, and making no Proviſion for any after-born Son, who would only have the new purchaſed Lands, *&c.* and no looſe Words ſhall overthrow a Will, *Hob.* 65. As to the Mortgages he held, They did not paſs to the Plaintiff by the Will, they being in Equity only Securities for Money, and were part of his perſonal Eſtate and when the Equity was afterwards purchaſed in, 'twas then as a new Acquiſition, a new purchaſe in Fee, and did not paſs by the Will made before: As to the

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ew purchaſed Lands he held, they did ot paſs by the Will, nor can the Codicils mount to a new Publication of the Will, ot being annexed to to it, and being ade quite to another purpoſe, 2 *Ro. Ab.* 17, 618. As to the Copyhold, he hought in this Caſe the Court would not upply the want of a Surrender to the ſe of his Will, and that therefore they ould deſcend to the Heirs at Law.

Trevor agreed with him *in omnibus*; ſaid, As to the particular Eſtates, thoſe ands indeed were in Settlement; but as the Inheritance, it could not be ſaid to in Settlement, that being the old Reerſion and Inheritance which he had beore; and tho' it was limited to him and is Heirs, yet it would have gone to them ithout any ſuch Limitation; and he d not enjoy it by vertue of the Settlent, but as the old Eſtate and Inheriance which he had in him before. As the Mortgages, tho' the legal Eſtate ſſed by the Will, yet they being in quity only Chattels, and looked upon Part of his perſonal Eſtate, the viſee would be but Truſtee of them the Girls. As to the Copyhold he d, This Court had helped no further an for Son, a Wife, or a Creditor, and erefore they ſhould not paſs. Maſter the Rolls *accord.* Lord Chancellor *accord.*

1 Chancery Caſes 205. 2 Chancery Caſes 52.

accord. First, As to the Copyhold h
ſaid, As this Caſe was circumſtanced, i
would be more Equity for this Court no
to ſupply the want of a Surrender, tha
7 Chancery Caſes 245. to ſupply it; for Equity conſiſts in Equa
lity, and it would be very unequal for th
Plaintiff to run away with all and th
Heirs at Law to have nothing, when th
Law itſelf has thrown a part to them
and 'twould be then no Equity to take i
from them, tho' rather than a Wife ſhoul
want a Maintenance, a Child a Proviſion,
or a Creditor go without his Debt, thi
Court will ſupply the Want in ſom
Caſes.

2*dly.* He held, That the new purchaſe
Lands did not paſs by the Will, the Co
dicils made after not being annexed to th
Will, and therefore could not amount t
a new Publication of it.

3*dly.* As to the Mortgages, they be
ing but Chattels and Securities only fo
Money at making the Will, and ſo n
Inchoation for paſſing them, tho' th
Equity of Redemption be after bought i
or forecloſed, yet they cannot paſs, tha
being a Revocation *pro tanto:* As to th
main Point, he took ſeveral Diſtinctions

1*ſt.* As to the Lands which he had
his own Purchaſe, there was no doub
but they paſſed.

2*dly.* As to the Lands which were ſe
tle

led upon the Son, there was no doubt likewiſe, but that they paſſed, the uſes of them being all determined, and the Inheritance ſettled and veſted in Sir *William*. 3*dly*. As to thoſe whereof he was Tenant in Tail, *&c.* they likewiſe paſſed, and ſo did alſo thoſe whereof he was Tenant in Tail, and the Uſes determined. As to Mr. *Vernon*'s Objection, That ſuppoſe he had deviſed all his Lands in Settlement, then without queſtion all theſe Lands would have paſſed: And now tho' he deviſes all out of Settlement, yet they would have contended to have them paſs likewiſe, and ſo the Words [out of Settlement] to ſignify nothing at all. As to this he ſaid, 'Tis true the Lands themſelves could not be in Settlement and out of Settlement at the ſame time, neither do the Lands themſelves paſs at all; for ponderous Land or *terra firma* remains where it did: And it is an impropriety of Speech, I give the Eſtate of all my Lands in Settlement, or I give the Eſtate of all my Lands, that are out of Settlement. And he allowed the Arguments on the other Side had their weight in them, which made him for ſome time doubt with himſelf of the Caſe; but at laſt he thought the Argument on the other Side out-weighed them, and ſo a Decree paſſed for the Plaintiff, as to the main Point, and for the reſt for the Defendants,

ſendants, who had brought a Bill for tha purpoſe.

Note, The 18th Day of *February* 170 this Caſe was heard in the Houſe o Lords, and the Decree was confirmed up on an Appeal thereon brought.

Corbet verſus *Maydewil*, 13 *Januarii* 1710 *In Canc'.*

THomas *Maydewil*, before his Marriag with *Margaret* his Wife, convey his Eſtate to the Uſe of him and his Hei till the Marriage; and after, as to th Lands in *Northamptonſhire*, to himſelf fo Life, Remainder to the Truſtees and thei Heirs during his Life, to preſerve Con tingent Uſes; and after his Deceaſe, t her for Jointure; and after her Deceaſ to her firſt, ſecond, third, fourth, fifth and every other Son and Sons on her Bo dy, ſeverally in Tail Mail; Remainde to the Heirs of his Body, Remainder t his right Heirs: And as to his Lands i *Leiceſterſhire* to himſelf for Life, Remainde to Truſtees and their Heirs for his Lif to preſerve Contingent Uſes; and aft his Deceaſe, to Truſtees, their Executor Adminiſtrators and Aſſigns for 500 Yea from thence next enſuing, upon the Truſt and Proviſoes after-named; and after th

ex

xpiration, or other determination of the
erm, to him and to the Heirs Male of
is Body on her, Reverſion to his right
Heirs; and the Term declared to be up-
n Truſt, that in caſe he ſhall happen to
ie without Iſſue Male of his Body on
r Body; or that the Iſſue Male between
hem ſhall happen to die without Iſſue
Male of their Bodies, before they or ſome
f them reſpectively attain their ſeveral
ges of 21 Years, and there ſhall be If-
ue one or more Daughter or Daughters of
is Body on her Body begotten, either
or after his Life-time, which ſhall be
married or not provided for, as herein
mentioned at the time of his Deceaſe,
at then the ſaid Daughter or Daughters
ſpectively ſhall have the reſpective
ortion and Portions herein after expreſ-
d, *viz.* If there ſhall be but one ſuch
aughter to have 2000 *l.* and if there be
wo or more ſuch Daughters, then ſuch
aughters ſhall have among them equal-
2000 *l.* the ſaid Portion or Portions of
e ſaid Daughter and Daughters to be
ſpectively payable, and paid at their
ſpective Ages of 18 Years, or Days of
arriage, which ſhall firſt happen, or as
on after as the ſame can conveniently
e raiſed: And in caſe the ſaid Portion
Portions of the ſaid Daughter or
aughters ſhall not be paid, according

to

ro the purport and intent of theſe Pre
ſents, that then the Truſtees, or the Sur
vivors of them, their Executors, Admi
niſtrators and Aſſigns, ſhall and may ou
of the Rents, Iſſues and Profits of the Pre
miſſes ſo limited to them, or by Leaſe
Mortgage or Sale thereof, or of all o
of any part of the ſaid Term of 50
Years, as to them in their Diſcretion ſha
ſeem meet, raiſe, make up, and pay th
ſaid Portion and Portions unto th
ſaid Daughter or Daughters; and i
the mean time, until the ſaid Po
tion or Portions ſhall reſpectively becom
payable as aforeſaid, the Truſtees, the
Executors, Adminiſtrators and Aſſign
ſhall out of the Rents, Iſſues, and Profi
of the Premiſſes to them limited, rai
convenient Maintenance for ſuch Daug
ter or Daughters, not exceeding 30 *l.*
Annum a-piece; and if there be mo
than three, not exceeding 20 *l. per An*
a-piece, and ſhall permit ſuch Perſon
Perſons, to whom the Freehold and Inh
ritance of the Premiſſes, immediately
pectant on the ſaid Term of 500 Yea
ſhall for the time being appertain, to
ceive and take the overplus of the Re
and Profits of the Premiſſes, until
ſaid Portion or Portions of the ſaid Daug
ter or Daughters ſhall be paid accord
to the Intent of theſe Preſents; and a

the ſaid Portions and Maintenances ſhall be raiſed, then the Premiſſes, or ſo much thereof as ſhall remain unſold, ſhall go with and attend the Reverſion and Inheritance; and be for the benefit of that Perſon or Perſons to whom the Reverſion and Inheritance, immediately expectant on the ſaid Term of 500 Years, ſhall for the time being appertain, according to the Uſes and Eſtates herein before limited: Provided always, that if he in his Lifetime, or if after his Deceaſe the Perſon or Perſons, to whom the Reverſion and Inheritance expectant on the ſaid Term of 500 Years, according to the Uſes and Eſtates herein before limited, ſhall for the time being appertain, do or ſhall well and truly pay, or cauſe to be paid, or to the good liking of the Truſtees, their Executors, Adminiſtrators or Aſſigns, ſufficiently ſecure to pay to the ſaid Daughter or Daughters of him on her Body, which ſhall be unmarried at the time of his Deceaſe, the ſaid Portion and Portions and Yearly Sums of Money for the Maintenances, here before limited to be charged, or intended to be charged or raiſed for the ſaid Daughter or Daughters reſpectively, according to the true intent and meaning of theſe Preſents; or if there ſhall be no Iſſue female of his Body on her, or if the Iſſue female ſhall all of

them happen to die before any of them attain the Age of 18 Years; or if the Iſſue Male between him and her, or any of them, ſhall live to attain the Age of 21 Years, or leave Iſſue Male, lawfully begotten, behind them, that then in ſuch and in every or any of theſe Caſes, and at all times from thenceforth, the ſaid Eſtate and Term of 500 Years ſhall ceaſe, determine and be void, any thing herein contained to the contrary notwithſtanding.

Margaret the Wife died 15 Months after Marriage without Iſſue Male, leaving one Daughter, who is now 28 Years old, and to whom the Father, the ſaid *Thomas Maydewell*, for 7 Years before her intermarriage with Mr. *Corbet*, the Plaintiff, paid the Maintenance of 30*l. per Ann.* Mr. *Maydewell*, ſome few Years after *Margaret*'s Death, married another Wife, by whom he has ſeveral Children.

Upon this Caſe, Mr. *Vernon*, Mr. *Dobins* and Mr. *Williams*, being clearly of Opinion, That the Portion ought to be raiſed with Intereſt from 18; a Bill was brought for that purpoſe.

Mr. *Maydewell* admits in his Anſwer That he placed his Daughter with her Grandmother *Elizabeth Collins*; and that he paid her for about 7 Years, the Maintenance of 30*l. per Annum*, and took Re-

ceipt

ceipts for the ſame, for ſo much due at ſuch a time. *Elizabeth Collins*, the Grandmother, in her Depoſitions declares, That her Grandaughter married Mr. *Corbet* by her Conſent, Advice and Direction; and her Reaſons for her ſo doing were, That ſeveral advantageous offers had been made from time to time to her Father in the way of Marriage, but he never could be prevailed upon to conſent to any Match whatſoever, notwithſtanding his Daughter behaved her ſelf very dutifully to him. Several Letters from Mr. *Maydewell* to one Mr. *Orlebar* were produced, and proved at the hearing, wherein he ſays, That he conſtantly paid his Daughter the 30*l per Annum*, due to her by her Mother's Marriage-Settlement.

December the 8th, 1709, the Caſe came to be heard before my Lord Chancellor, and the Plaintiff's Counſel inſiſting upon the Caſe of *Staniforth* and *Staniforth*, where the Words were, That if it ſhould happen that the Father and Mother depart this Life leaving no Iſſue Male, then to Truſtees for 200 Years from the deceaſe of the Survivor of them, to raiſe Portions for Daughters, without limiting any time for payment; his Lordſhip ſaid, The Word [*And*] might be conſtrued diſjunctively in that Caſe, but in this here being a Condition, precedent to the veſting

Poſt. 201.

of the Portion, it must be performed by the Father's dying before it could be raised; that being, as he thought, a substantial provident part of the Settlement; and therefore would have dismiss'd the Bill, had not Mr. *Vernon* prevailed on his Lordship to be attended with Precedents.

2 Jones 201. And a Case in 2 *Jones* 201. *Pasch.* 34. *Car.* 2. reported there by the Name of *Greaves* and *Mattison*, was produced, it was in the King's Bench for the Resolution of the Court: Sir *Edward Greaves* the Plaintiff conveys his Estate to the use of himself for Life, Remainder to the first and other Sons of his Body on his Wife in Tail Male; and for want of such Issue to Trustees for forty Years, Reversion to his Heirs. The Term was declared to be in Trust, That in case it should happen the said Sir *Edward* to decease without Issue Male of his Body begotten on his Wife, and in case there shall be but one Daughter, that then the Trustees, their Executors, Administrators and Assigns, shall out of the Rents, Issues and Profits of the Land, by demising, letting or setting the same, raise 5000 *l.* to be paid to the said Daughter at the Day of her Marriage or her Age of 21 Years, which should first happen, together with the Yearly Sum of 150 *l.* for her Maintenance and Education, until her Marriage or Age afore

aforeſaid; and in caſe there ſhall be more Daughters, then 6000 *l.* to be equally divided among them, part and part alike, and to be paid them reſpectively, when they ſhall accompliſh their reſpective Ages of 21 Years or Days of Marriage, which ſhall firſt happen, together with the Yearly Sum of 200 *l.* for the Maintenance and Education of ſuch Daughters, until they ſhall reſpectively attain to their ſeveral Ages, or be married, (firſt happening) a reſpective, equal and proportionable part of the ſaid 200 *l.* allowed for her Maintenance to ceaſe: And in caſe any of the ſaid Daughters ſhall happen to deceaſe before her or their reſpective Ages of 21 Years or Days of Marriage; then the Portion of the ſaid Daughter or Daughters, ſo deceaſing, to be equally paid and divided to and amongſt the other Daughters, and to be paid unto them at their reſpective Ages of 21 Years or Days of Marriage, which ſhall firſt happen. Sir *Edward's* Wife died, leaving two Daughters, but no Iſſue Male; one of them died about 7 Years old; the other, without his privity, married the Defendant, a Journeyman Mercer; whereupon the Father brought an Action of Treſpaſs for marrying his Daughter, and had a Verdict: But in order to ſettle the Portion, it was referred to Juſtice *Raymond* (the Fa-

ther dying in the mean time) to hear Counſel on both Sides upon the Caſe; And it depending four Terms, each Side being ſtrongly of their own Opinion, after debate at Bar and Bench, it was reſolved by the Lord Chief Juſtice *Pemberton*, Mr Juſtice *Dolben*, and Mr Juſtice *Raymond*, That ſhe ſhould have 6000 *l.* and that becauſe, firſt, the Intereſt and Right of the Portion was veſted in the Daughters by the Death of their Mother without Iſſue Male, and ſhould not attend the Death of the Father. 2*dly*. That then the Truſtees might ſell their Intereſt in the Term to raiſe the Maintenance or pay the Portion, if any Daughter attained her Age or was married in his Life-time; for perhaps he might marry (as Sir *Edward* had done) another Wife, and not take due care of them, or live ſo long, that they would not have their Portions in convenient time. And 3*dly*. The Intereſt having thus veſted in the two Daughters by expreſs Words, they were to have 6000 *l.* between them, and by the Death of one, the Survivor was intitled to the whole.

Jones Juſtice, tho' he agreed the Term might be ſold in his Life-time, differed; For firſt, it veſts not abſolutely but contingently during his Life; the Words being, in caſe he deceaſe without Iſſue Male.

2*dly*. As it is to be raiſed out of the Rents, Iſſues, and Profits, which cannot be during his Life, for the Words Demiſing, Letting and Setting are intended, when they can take the Rents, Iſſues, and Profits which cannot be during his Life: And it ſhall be preſumed the Father will take care of them, unleſs that Care be expreſly transferred to Truſtees; otherwiſe it will encourage Diſobedience, and be a means to ruin them by Matches.

Heyter and Jones.

The Caſe of *Heyter* and *Jones*, decreed by the Lords Commiſſioners, 14 *November*, 10 *Will.* 3. and afterwards affirmed by their Lordſhips upon a Re-hearing; and afterwards affirmed upon an Appeal to the Houſe of Lords. Lands were ſettled upon the Marriage of the Plaintiff's Mother and Father for their Lives; and afterwards in Truſt, that the Truſtees, after the deceaſe of the Plaintiff's Father and Mother, ſhould out of the Rents and Profits of the Premiſſes, or by Fines, raiſe 4000 *l.* for the Portions of all the Children of that Marriage (except the eldeſt Son) to be paid at their Ages of 21 Years, unleſs the next Heir ſhould within one Year after the ſaid Portion become payable, pay or ſecure the ſame: The Father dies, leaving Iſſue a Son and ſeveral other Children. Decreed, That *Dorothy Heyter*, one of the younger Children, was

entitled to her Portion of 4000 *l.* with Intereſt for the ſame from her Age of 21 Years, though ſhe attained that Age 10 Years before the Mother's Death. 'Tis true, in this Caſe the Defendant obtained a Deed from the Plaintiff by ſurpriſe, to pay Intereſt for the Portion: But the Bill being to have Relief againſt that Deed, the Cauſe was decreed upon the Merits with reſpect to the Settlement only.

Gerrard and Gerrard.

Alſo the Caſe of *Gerrard* and *Gerrard*, decreed by my Lord Keeper *Wright*, 2 *Annæ*, upon the Marriage of Sir *Charles Gerrard* with *Honora* his Wife, Daughter of my Lord *Seymour*: Lands were ſettled to the Uſe of himſelf for Life; Remainder to his Wife for Life; Remainder to Truſtees for 200 Years, upon Truſt, that if Sir *Charles Gerrard* ſhould die, leaving only one Daughter by this Marriage, then for the raiſing 5000 *l.* for her Portion, to be paid at her Age of 21 Years or Day of Marriage, which ſhould firſt happen, after the deceaſe of the ſaid Sir *Charles* and *Honora*, or within ſix Months after the ſaid Days or Times reſpectively, Provided that if Sir *Charles*, or any other Perſon to whom the Inheritance of the Premiſſes ſhould come, ſhould pay the ſaid Portion to ſuch Daughter at the time aforeſaid, or give good Security to be approved of by the Truſtees, they ſhould

ſurrender the Term. Sir *Charles* dies, leaving the Plaintiff *Elizabeth* his only Child; and tho' in this Caſe, by expreſs Words of the Deed of Settlement, the Portion is not appointed to be paid till her Day of Marriage or Age of 21 Years, which ſhould firſt happen after the deceaſe of her Father and Mother; which was provident, becauſe the ſame Eſtate with the Mother's Jointure, yet the Court decreed the Portion and Intereſt from the time in the Bill in the Mother's Life time.

Staniforth and *Staniforth*, decreed at *Powis*-Houſe by the Maſter of the Rolls, 13 *March.* 3*tio* of the Queen. Lands were ſettled upon his Marriage with *Chriſtian*, to the Uſe of the ſaid *Jonathan Staniforth* for Life, Remainder to *Chriſtopher* for Life, Remainder to the Heirs Male of *Jonathan* and *Chriſtian*: And if it ſhould happen that the ſaid *Jonathan* and *Chriſtian* depart this Life, leaving no Iſſue Male, then to Truſtees for 200 Years, from the deceaſe of the Survivor of the ſaid *Jonathan* and *Chriſtian*, for raiſing Portions for Daughters. *Jonathan* dies without Iſſue Male, leaving one Daughter; and by the expreſs Words of the Settlement, the Term ſecuring the Plaintiff *Chriſtian*'s Portion, is not to ariſe till after the Death of the Survivor of *Jonathan* and *Chriſtian*: Yet the Court decreed the Portion to be raiſed

Staniforth and Staniforth. Ante 195.

raiſed and paid in the Life-time of *Chriſtian*, whoſe Jointure covered the Eſtate, with Intereſt from filing the Bill, though there was no expreſs Time limited for the Payment thereof, and therefore ſhould the rather be intended at the Death of the Survivor.

Ante 21. *December* the 8th 1709, the Cauſe came to be heard before my Lord Chancellor, and the Plaintiff's Counſel inſiſting upon the Caſe of *Staniforth* and *Staniforth*, where the Words were, That if it ſhould happen that the Father and Mother depart this Life, leaving no Iſſue Male, then the Truſtees for 200 Years from the deceaſe of the Survivor of them, to raiſe Portions for Daughters, without limiting any time for Payment, his Lordſhip ſaid The Word [And] might be conſtrued diſjunctively in that Caſe, but in this here being a Condition precedent to the veſting of the Portion, it muſt be performed by the Father's dying before it can be raiſed, that being, as he thought, a ſubſtantial provident part of the Settlement.

13 *June* 1710. His Lordſhip without further Argument, pronounced his Decree to this effect, *viz.* This is one of thoſe ill-penned Settlements, where the Conveyancer, not for want of Skill, but by an ill-made Uſe of a multiplicity of Words

runs into thoſe blunders which occaſion Trouble to this Court: My Opinion therefore in this Caſe will be cleared up, by leaving out theſe Words which are immaterial: But firſt, to diſtinguiſh from the Precedents, *Heyter* and *Jones* is impertinent, and Counſel ought to adviſe their Clients better than to trouble the Court with Caſes which ſignify nothing at all to the purpoſe: for there a Man came to be relieved againſt his own deliberate Agreement, after an abatement for Intereſt, which was payable by the Deed. In *Gerrard* and *Gerrard*, the Words *after the Death of the Father and Mother*, were juſtly rejected, in order to raiſe the Portion at a time, when for Conveniency and to procure a proper Match for the Daughter in Marriage, which is the natural and true uſe of it, the ſame ought to be raiſed. As to the other two, if it had been *res integra*, I ſhould not have gone ſo great a length; but ſince this Court and the Judges of Common Law have thought fit to allow it, I will conſider the Reaſons and diſtinguiſh them from the Caſe before me: To begin *a notioribus*, which is the cleareſt Method of Reaſoning, Firſt, Where a Term is veſted, as in this Caſe, and the Portion is payable at a Day certain, there, tho' the Term be to ariſe after the Father's Death, the Portion ſhall ariſe in his Life-

Life-time. 2*dly*. Where the Term and the Portion are both to ariſe upon a Contingency, as in the Caſe of *Staniforth* and *Staniforth*, there, becauſe a total failure of Iſſue Male between the Parties is all that was contingent in the Caſe (for it is certain all Fleſh muſt die) the Portion ſhall be raiſed in the Life-time of the Father or Mother, at the Day of Payment, which in that Caſe was the Age of 18, or Day of Marriage, in regard the Term muſt certainly veſt, and can never be defeated by leaving of Iſſue Male. 3*dly*. Which is much the ſtronger and comes neareſt this Caſe, where the Term is veſted and the Portion contingent, as in *Greaves* and *Mattiſon*'s Caſe, there the failure of Iſſue Male between the Parties ſhall tantamount the deceaſe of the Father without Iſſue Male of the Body of his Wife, and the Portion be raiſed even in his Life-time becauſe payable at a Day certain; and eſpecially ſince it is directed by the Deed in that Caſe, to be raiſed by Sale thereof. Theſe Conceſſions I have made, becauſe I find it to have been the current Motion of late, but I think it of a hard digeſtion, and tho' in this Caſe I agree the Plaintiff have a very colourable Demand, yet I cannot make any Decree for them, becauſe leaving out the ſuperfluous Words and putting in thoſe which the Conveyance

ancer ought to have inſerted, it will appear to be much ſtronger than any of the former Caſes, and ſtands thus, *viz.* In Caſe the Father ſhall happen to die without Iſſue Male of the Body of his Wife, and there ſhall be a Daughter begotten between them, which ſhall be unmarried or unprovided for at the time of his deceaſe; ſhe is to take by this Deſcription, or elſe ſhe cannot have this Portion: Now tho' the Plaintiff's Wife cannot be then unmarried, yet ſhe may be provided for in his Lifetime; which remains ſtill contingent, becauſe no Body can yet ſay ſhe will be unprovided for at the time of his deceaſe: But the Deed goes further and ſays [Then] (that is, at the time of his deceaſe) the ſaid Daughter ſhall have 2000 *l.* paid for her Portion; and in the mean time (that is, from failure of Iſſue Male till payable) the Truſtees ſhall out of the Rents, Iſſues and Profits raiſe 30 *l. per Annum* for her Maintenance, which muſt be after the Father's Death; for tho' theſe Words [Profits, *&c.*] may be conſtrued by Sale or Mortgage where they ſtand alone in a Deed, yet being here put in Contradiſtinction to Mortgage or Sale, they muſt be underſtood of Annual Profits only; and that cannot be, unleſs you will let the Maintenances run in upon his Eſtate for Life; ſo that 'tis plain in the Proviſo,

if

if he in his Life-time pay, or ſufficiently ſecure to be paid to ſuch Daughter as ſhall be unmarried; there is *vitium Clerici* by leaving out theſe Words (*or not provided for*) at the time of his deceaſe, and if they be inſerted, all parts of the Deed will conſiſt, and this plain and natural Conſtruction will ariſe thereupon, that the Father, at any time during his Life, by paying her 2000 *l.* ſhall defeat the Term. And therefore he diſmiſs'd the Bill without Coſts.

Hawes verſus *Warner* & alios.

IN *Michaelmas* Term 1703, *Thomas* and *Anne*, two of the Children of *Thomas Hawes*, who was the only Son of *Nathaniel Hawes*, late Treaſurer of *Chriſt-church* Hoſpital and Citizen of *London* brought their Bill in this Court againſt *Anne Warner*, Widow, only Daughter of the ſaid *Nathaniel*, and her four Children, *viz. Anne*, *Elizabeth*, *Mary* and *Edmund Warner*, and againſt *Nathaniel Hawes*, Son of the ſaid *Thomas*, as Heir, and others as Executors of the Will of the ſaid *Nathaniel* the Grandfather, ſetting forth, That the ſaid *Thomas*, the Father of the Plaintiffs, died in the Life-time of their ſaid Grandfather, leaving Iſſue *Nathaniel Hawes* and the ſaid Plaintiffs *Thomas* and *Anne*

and that the ſaid Defendant *Anne*, Daughter of the ſaid *Nathaniel*, having intermarried with one *Edmund Warner*, had Iſſue by him the ſaid four Infants Defendants.

That the ſaid *Nathaniel* the Grandfather became indebted to his ſaid Son *Thomas*, on account of Profits received out of an Eſtate of the ſaid Son at *Walmire* in *Yorkſhire*, and otherwiſe, to the Amount of 2200 *l.* and upwards; and that he gave with his ſaid Daughter a very conſiderable Marriage-Portion, and was bound for his Son-in-Law *Edmund Warner* to the Amount of 3000 *l.* beſides which, the ſaid *Edmund* was indebted to him in 500 *l.* by Note under his Hand, and alſo in 905 *l.* 19 *s.* 6 *d.* paid upon his account; and that the ſaid *Edmund* died in the Life-time of the ſaid *Nathaniel*, and the ſaid Debt remains unpaid.

That the ſaid *Nathaniel* being ſeized in Fee of divers Meſſuages in *Thames-ſtreet*, mortgaged the ſame for 1660 *l.* and by the Mortgage-Deeds covenanted to pay the ſaid Sum: And afterwards, *viz.* 21 *July* 1699, made his Will, and thereby Will.
deviſed one of the ſaid Meſſuages to his Grandſon *Nathaniel Hawes* and his Heirs, and another to his Grandſon *Thomas Hawes* and his Heirs, and another to *Anne Warner* his Grandaughter for Life,

Re-

Remainder to the ſaid *Thomas* and his Heirs, and gave ſeveral pecuniary Legacies to his Daughter *Anne Warner* Widow, and to his Grandchildren by her; and alſo to his Daughter-in-Law *Elizabeth Hawes* the Widow of his Son *Thomas*, and to his Grandaughters by her, with ſome other ſmall Legacies, amounting in the whole to 5800 *l.* which Sum he by his ſaid Will calculated to be the *reſiduum* of his perſonal Eſtate, (his Debts and Funeral Expences being firſt thereout paid) And by his ſaid Will did alſo declare,

Declaration: That in Caſe his ſaid Eſtate ſhould by Loſſes or otherwiſe fall ſhort of his Eſtimate, a proportionable abatement ſhould be made to the ſeveral Legatees of the Legacies thereby given: And in caſe his ſaid Eſtate, at the time of his Death ſhould exceed the ſaid Eſtimate of 5800 *l.* he did give the ſurplus (whatever it ſhould prove) to and amongſt all his Grandchildren, ſhare and ſhare alike: And in the

Proviſo. ſaid Will is a Proviſo, That the ſeveral Deviſees of his Real Eſtate, and the ſeveral Legacies and Sums of Money to his Daughter-in-Law Mrs. *Hawes*, and his Grandchildren by her, were upon Condition, That ſhe within three Months after his Deceaſe, and her Children, when of Age, ſhould releaſe to his Executors all Moneys, Parts, Shares, Claims and

Deman

Demands wharſoever, which they or any of them could claim out of his perſonal Eſtate, or be entitled to by vertue of the Cuſtom of *London* or otherwiſe, or which they could claim or demand in right of his Son *Thomas* deceaſed, or in reference to his the ſaid *Thomas* the Son's, or the ſaid *Nathaniel* the Teſtator's Eſtate; and in caſe they did make ſuch claim, *&c.* then he deviſed over the ſame Meſſuages and other their Legacies to the Children of his Daughter *Warner*, ſhare and ſhare alike. And the End of the Bill was to have the ſaid 1600 *l.* remaining due upon the ſaid Mortgage, paid out of the perſonal Eſtate, and that the mortgaged Premiſſes, ſo deviſed to the Plaintiffs as aforeſaid, might be diſcharged thereof.

Note, this was by reaſon of the Profits of the Son's Eſtate received by the Teſtator.

End of the Bill.

The Defendants by their Anſwer, confeſſed the ſubſtance of what was alledged by the Plaintiffs in their Bill, but urged, that the Teſtator's intent was, That the Legatees of the mortgaged Meſſuages ſhould abate in proportion with the pecuniary Legatees, and that the Will did ſo deviſe.

Defendants Anſwer.

And 7 *Februarii* 1704. the Cauſe was heard by the Lord Keeper *Wright*, at which time it was inſiſted on behalf of the Plaintiffs;

Hearing.

1. That the Money due on the mortgaged Premiſſes being a Debt of the Teſtator's

Arguments pro Quer.

ſtator's (there being a Covenant in the mortgage Deed for him to pay it) this, as well as other Debts of the Teſtator, ought to be paid out of the Perſonal Eſtate; and this was more plain from the Words of the Will, which directs, That the Teſtator's Debts and Funerals ſhould be paid in the firſt place out of the Perſonal Eſtate: And that the Teſtator's being uncertain in the Calculation of his Eſtate, was not ſtrange, conſidering, that at the time of making his Will he was engaged in a Partnerſhip-Trade, depending upon long, confuſed and intricate Accompts, which had not been made up in 16 Years time.

2. That altho' the Will directs the Legatees ſhould abate in proportion, yet it does not direct, That the Deviſees of the real Eſtate ſhould make any abatement. And that there is a known difference between a Deviſee and a Legatee, the former being of a real Eſtate, but the latter only of perſonal Things; and that the Difference ſeems to be accordingly well known to the Teſtator, and to be taken notice of in the Words of the Will: For the real Eſtate is thereby ſpecifically deviſed, and ſo ought not to be contributory to any deficiency of the Perſonal Eſtate, which is expreſly charged with the payment of his Debts. And as this Caſe is, it is much the ſtronger, becauſe here is

is a good and valuable Conſideration for the Deviſees to have the real Eſtate; for that the Teſtator was indebted to his Son (their Father) in 2200 *l.* for Rents received of his ſaid Son's own proper Eſtate left him by a Relation) during his Minority, beſides 1015 *l.* 5 *s.* 2 *d.* as appears by Accompts under his own Hand, received for Dividends of *Eaſt-India* Stock, the Truſt whereof is declared under the Teſtator's own Hand and Seal, and this in time after the making of the ſaid Will, and that theſe demands are very near Equivalent to the whole real Eſtate.

To which it was anſwered on behalf of the Defendants.

1. That it ſeems apparently the Intent of the Teſtator throughout his ſaid Will, That in caſe his perſonal Eſtate ſhould prove ſo deficient as not to make good the particular Legacies thereby deviſed, every Legatee ſhould abate in proportion; and that the mortgaged Premiſſes ſhould bear their own Burthen: And if he had intended that they ſhould have been exonerated, he would have provided ſo by his Will when he deviſed thoſe Premiſſes. Arguments pro Def.

2. That it is not likely he could mean, That the Mortgage ſhould be paid out of the Perſonal Eſtate, becauſe he calculates that to be 5860 *l.* which is very near what his ſaid Eſtate amounts unto; and

it would have been more, if the Intereſt of the 1600 *l.* from the Teſtator's Death had not been paid out of it; and that it appears the Teſtator made his Will from a Calculation of his Eſtate.

3. That the Houſes deviſed are 300 *l. per Ann.* and tho' the Deviſees thereof pay the 1600 *l.* charged thereon out of the ſame, yet they will have near twice as much as any of the other Legatees: And therefore, that the Teſtator's Will would be beſt fulfilled by letting the Houſes bear the Mortgage, which is their own Burden, and the perſonal Eſtate be applyed to pay the Legacies; by which means they will be all paid unto a very ſmall matter.

Decree. But the Court decreed, That the 1600 *l.* and all the Intereſt thereof, due on the ſaid Mortgage, ſhould be paid out of the Teſtator's perſonal Eſtate.

And that the Plaintiffs, if they will have the benefit of their Legacies, muſt ſeverally releaſe their Claim of the *East-India* Stock and the produce thereof, and the Accompt for the *Walmire* Eſtate, according to the intention of the Will.

And that the Legatees ſhould abate in proportion, in caſe the perſonal Eſtate ſhould fall ſhort, and that the Executors ſhould Accompt before a Maſter touching the ſaid perſonal Eſtate, the *East-India* Stock

Stock and Produce to be taken as part thereof; and that the Plaintiffs and Defendants ſhould both have their Coſts of Suit out of the perſonal Eſtate.

Hereupon the Maſter reported, That the perſonal Eſtate fell ſhort to pay the Legacies 1732 *l.* 12 *s.* 2 *d.* and charged the Deviſees of the real Eſtate to contribute by a pound Rate, together with the pecuniary Legatees, to make good the deficiency of the perſonal Eſtate.

To which Report the Plaintiffs excepted, for that the real Eſtate was not to contribute or bear any part of the deficiency of the perſonal Eſtate: Which Exception being argued before the Lord Chancellor *Cowper*, was allowed; and the Court declared, That that part of the Decree which ſays the 1600 *l.* ſhould be paid out of the perſonal Eſtate, could not be altered but by a Re-hearing or an Appeal.

After which the Defendants got an Order for a Re-hearing; but on the Plaintiffs Motion, ſhewing the long acquieſcence under the Decree, *viz.* 3 Years, and apparent delays in the Cauſe, the Order for Re-hearing was diſcharged.

And afterwards on an Appeal, the Decree of this Court was affirmed in the Houſe of Lords, *March* the 7th. 170⅞.

De Termino Paſchæ 1688. *In Cancellaria.*

Sanders verſus *Charles Ballard.*

1. l. 2. Vern. 46. & Eq. Cas. Abr. 292

A. Deviſed 200 *l.* to be laid out in a purchaſe of Lands, and ſettled upon *M.* and the Heirs of her Body; and if *M.* die without Iſſue, that then the Children of *J. S.* ſhall have it (or Words to that effect) ſo that it did not appear by the Will, whether the Teſtator intended that the Children ſhould have the Land as Joint-tenants or Tenants in common. *M.* died without Iſſue; the Truſtees afterwards purchaſe Land with the 200 *l.* and ſettle it on *C.* and *D.* the two then living Children of *J. S.* and their Heirs: *C.* hath Iſſue and dies. The Court would not help the Iſſue of *C.* againſt *D.* who had claimed all by Survivorſhip; for my Lord ſaid, He would not make it a breach of Truſt in the Truſtees, that they did make this a joint purchaſe, there being nothing in the Will to direct them otherwiſe: But if the Money had remained in their hands, he ſeem'd to be of Opinion, That the Children of *C.* ſhould have had a Moiety; for where Money is given to two (being perſonal Eſtate) it ſhall be ſeveral to them.

See 1. Vern. Cha. Cas. 118. where Lord Thurlow cites, & ſeems to approve of this doctrine as to money.

Thomſon and *Baskervill.*

THE Plaintiff's Cauſe was heard before the Maſter of the Rolls: and the Maſter ordered, That (for want of proper Parties, (*viz*) for that the Mortgagor was not made a Party, the Plaintiff being a ſecond Mortgagee, and conteſting the Validity of the firſt Mortgage, pretended to be made unto the Defendant, and to have an Accompt if a true one, *&c.*) the Plaintiff ſhould pay 5 Marks coſts, and make the Mortgagor a Party. The Plaintiff ſets down his Cauſe as an original Cauſe, and not by way of Appeal, having indeed amended his Bill, but never ſerved the Mortgagor with Proceſs; which he pretended he could not do, becauſe the Mortgagor was beyond Sea, but that they left a *Subpœna* at the laſt place of his abode, (*viz.*) the King's Bench (where he had been a Priſoner, but eſcaped) But the Court would not hear the Cauſe; for the Plaintiff ought to have the Mortgagor's Anſwer, or run out all the Proceſs of Contempt to a Sequeſtration, before he can hear his Cauſe againſt the Defendant.

Gwevers verſus the Earl of *Danby* & al'.

LAnds were ſettled by the Parliament for the payment of Mr *Cooke*'s Debts, of *Norfolk*. The Truſtees brought one Bill againſt the Adminiſtrators of *Cooke*, to diſcover the perſonal Eſtate, *&c.* And the Adminiſtrators, who were Adminiſtrators as Creditors to *Cooke*, with 3 or 4 of the Creditors, bring a Bill againſt the Truſtees: And it was decreed, That they ſhall ſell, *&c.* and that all Creditors may come in by a Time, contributing to the Charges, *&c.* And now the Plaintiffs, as other Creditors, exhibit their Bill againſt the Adminiſtrators and againſt the Truſtees, to diſcover the perſonal Eſtate, and to have the Lands ſold, *&c.* The Defendants objected, That the Plaintiffs ought not to have exhibited a new Bill, but by Motion to the Court, come in as Creditors upon the former Bill exhibited by the Adminiſtrators. But the Court over-ruled it, and ſaid, this Bill was well brought, becauſe it calleth the Adminiſtrators themſelves to an Accompt, which could not be upon the former Bills.

Earl of *Pembroke* verſus *Bowden & al'*, Creditors of the late Earl of *P.* & è *contra.*

THE late Earl of *Pembroke* ſeized in Fee of Lands, demiſed them for 100 Years at a Pepper-Corn Rent, and takes back a Leaſe, with a Proviſo to be void if he paid not ſuch an annual Sum to *J. S.* and 1000 *l.* to *J. D.* (or to that Effect) And the Creditors of the ſaid Earl contended to make the ſurpluſage of this Term (it being worth more than the 1000 *l.*) and the Annuity payable out of it, aſſets to pay his Debts; and the Earl as Heir pretends, that it ought to go to him, and that it is but as if the deceaſed Earl had mortgaged it, and the ſame had been forfeited: For then the Court agreed, That the Heir paying the Money ſhould have had it: And 'twas urged for him, That the intent of this Conveyance was the ſame as a Mortgage, though 'twas ſo contrived by Counſel, that there is indeed a Term in the Teſtator: And the Lord Chancellor cited a Caſe between *Whitticke* and —— in my Lord *Hale* his Time in *B. R.* where *J. S.* before and in Conſideration of his Marriage with *J. D.* enter'd into Articles of Agreement under Hand and Seal, to lodge 100 *l.* in the Hands

of *J. N.* to be laid out upon Lands for the Life of the Wife, for her Jointure, with other Remainders which ſaid 100 *l.* was ſo lodged in his Hands; and before any Lands bought, *J. S.* dies, and a Creditor of *J. S.* ſues his Wife, who had taken out Adminiſtration to him; and upon a ſpecial Verdict finding as aforeſaid, the 100 *l.* was adjudged not to be Aſſets in Law: And my Lord ſaid, That in *Honywood's* Caſe, here in Chancery, he had decreed either the ſame or the like Point, and then brought the Record of that Caſe into the Court. For the Intent being, that the 100 *l.* ſhould be veſted in Land, it was to be no longer looked upon to be the perſonal Eſtate of *J. S.* and therefore he ſeemed to doubt here, whether this Term were ſo much as Aſſets in Law, for that it was the plain Intent, That the Inheritance ſhould not be changed for any Intent, but to ſecure ſuch Moneys; and it might have been done by way of Mortgage, ſo that then the Creditors could have had no pretence to charge it with Debts; and 'twould be very hard, and might prove of dangerous Conſequence upon this way of Settlements, by demiſe and redemiſe, to make any other Conſtruction, and which was ſurely never thought of in the Contrivance of the Counſel, at his adviſing ſuch a manner of Conveyance.

But

But the Court adviſed (being aſſiſted by *Lutwich* and *Powell*) till next Term.

Nota, It ſeems to me, that in the Caſe of *Marriage-Money*, by force of the Agreement, and lodging the Money in a third Perſon's Hand (*viz. J. N*'s.) the property of the 100 *l.* was in *J. N.* not in *J. S.* upon ſuch Truſts as agreed, and ſo could not be Aſſets in Law nor yet in Equity, becauſe it was for ſpecial Truſts to be directed by the expreſs Agreement.

'Twas alſo ſaid and agreed in the debate of the principal Caſe, That where a Man purchaſes an Eſtate, upon which there are Mortgages for Years, and he takes the Terms to himſelf, and the Inheritance to others in Truſt for himſelf, and dies indebted; the Terms ſhall be Aſſets, albeit that it be expreſly declared, that the Terms ſhall wait upon the Inheritance; for this Court will not take away that which is Aſſets in Law, though it will many times enlarge and make that Aſſets in Equity which is not Aſſets in Law, in favour of Creditors: But where the Inheritance is in the Purchaſor, and the Terms purchaſed in Truſtees Names to attend on the Inheritance, thoſe Terms ſhall never be made Aſſets in Equity.

Quære, Whether in the firſt Caſe where the Term is in the Purchaſor, *&c.* whether the Land ſhall go to the Heir or Executor,

ecutor, there being no Debts? And it ſeems to me the Heir ſhall have it, being to attend on the Inheritance: *But Equity will favour Creditors more than Executors.*

And if a Copyhold of Inheritance not ſurrendered to the Uſe of his Will, be deviſed to be ſold for payment of his Debts, the Creditors ſhall enforce the Heir in Chancery to ſell it; and as I underſtood, Mr. Serj. *Phillips* ſaid it had been adjudged ſo: And ſo 'tis in the Caſe of Charitable Uſes.

Nota, 'Twas alſo ſaid and agreed, That where a Man articles for the Sale of Land under Hand and Seal, and without any farther Execution thereof, they by mutual Conſent go off of the Bargain (by releaſing each other or cancelling the Articles, *&c.*) and then the Bargainor dies indebted this ſhall not be Aſſets: So if part of the Money was paid, and the Bargainor repays it, and they agree to go off as aforeſaid, and then the Bargainor dies: But if the Bargainor dies, part of the Money having been paid him, and no Conveyance made to the Bargainee; as the Bargainee hath a Remedy in Equity to compel the Heir of the Bargainor to make the Conveyance upon paying the reſidue of the Money; ſo the Creditors can force the Heir to convey, and the Bargainee to pay the Money as the Teſtator's perſonal Eſtate

Eſtate; and it ſhall be Aſſets to them in Law and in Equity when paid. But *Quære*, Whether, when there be no Debts, and part of the Money paid as aforeſaid, the Executors ſhall force the Heir to ſell, and ſhall have the Money? Or, whether he and the Bargainee may not agree to go off the Bargain? For though the Anceſtor (having both his Executors as well as Heirs in him) might undo the Bargain, though executed in part, which may perhaps, as it were, amount to a Re-purchaſing of it; yet there is a diſtinct Intereſt betwixt the Heir and Executors after the Teſtator's deceaſe: So that the Teſtator having done an Act whereby he intends to deprive the Heir and make it a perſonal Eſtate, the Heir can't prevent it after.

But Note, Alſo in this principal Caſe, the Earl having agreed to ſell Lands for 5000 *l.* by Articles ſeal'd, *&c.* and a Mortgage being given up ro the Earl by the Bargainee for 3000 *l.* in part of payment, the Court ſeemed pretty clear, that the other 2000 *l.* ſhould be Aſſets, albeit thar the Bargainee did offer in his Anſwer to take the ſaid 3000 *l.* and releaſe the Bargain, if the Court pleaſed; or to that effect.

Exe-

Executors of *Pamplyn* verſus *J. S.*

THE Plaintiffs exhibited an Inventory amounting to 900 *l.* whereof 600 *l.* was in Leaſes. The Defendant recovered againſt the Plaintiff 200 *l.* owing to the Defendant by the Plaintiffs upon the Plea of *plene adminiſtravit*; and then the Plaintiffs exhibited this Bill, pretending that the Leaſes were mortgaged for more than they were worth: But their Bill was diſmiſſed, for it did not appear by any Proofs (if by the Bill) that the other 300 *l.* was adminiſtred, or that the Verdict was given upon the Accompt of the value of the Leaſes: Neither (as far as I could obſerve) did it appear that the Plaintiff had notice of the Leaſes being in Mortgage when the Verdict was given; which ſeems neceſſary to me to be done; for 'twas ſaid at the Bar, and not (that I obſerved) denied, that the Plaintiffs, notwithſtanding their Inventory, were not eſtopped to ſhew thoſe Mortgages, and then only the ſurpluſage could be Aſſets in Law. And beſides, *Pamplyn* had given the Executors other Freehold Lands of 800 *l.* value, to be ſold for the payment of his Debts, which was Aſſets in Equity at leaſt: But the Lord Chancellor ſeemed to rely only on the firſt Matters.

Sanders

Sanders verſus *Page.*

THE Husband and Wife, ſeized in Fee in the Right of the Wife, levied a Fine to *A.* and *B. &c.* to the Uſe of *A.* and *B.* for 1000 Years; and after to the Uſe of the Wife and her Heirs, and declared the Truſt of the Term to be for the Husband during his Life, and after for the Wife and the Heirs of her Body, with Remainders over; and after the Husband and the Wife join in a Fine *Jur conceſſit* to *J. S.* for 21 Years, rendering 110 *l.* Rent *per Annum* to the Baron for his Life, and after to the Wife and her Heirs, and after the Wife dies, and after her Husband dies Inteſtate. *Sanders* takes out Adminiſtration to the Husband, and *Page* to the Wife (being alſo Heir to her) and the Plaintiff ſues to have this Term for 1000 Years, upon pretence, that if it had been a Term in the Wife, in Law, her Husband ſhould have had it by Survivor, or at leaſt the Rent during the reſidue of the 21 Years, but the Bill was diſmiſs'd: For tho' it be true, that if a Woman be *Ceſtuy que truſt* of a Term (as the Caſe of Sir *Edward Turner* againſt his Mother was) and then marries without any Agreement by the Husband before Marriage, that the Truſt ſhall be to her ſeparate Uſe, and that the

the Husband ſhall not intermeddle there-with; yet if the Husband, after Marriage, diſpoſe of the Term for a valuable Conſideration, it ſhall be good in Equity, as well as if ſhe had the Term in her ſelf, and married, *&c.* And the Judgment that was given by the Lord *Nottingham* to the contrary, was ſaid by himſelf to have been upon a Miſtake; for that the Wife having married a former Husband, that Husband and ſhe, before the Marriage, did make ſuch Agreement; but when ſhe married with Sir *Edward Turner*, no ſuch Proviſion was made. But the Lord *Nottingham* thinking that ſuch Proviſion had been in his Caſe decreed the Sale void: And 'twas reverſed as it ſeems, by his own Approbation in the Houſe of Lords; But here is no ſuch thing, but the Husband is agreeing to the Truſt for the Term, and therefore ſhall not have it by Survivor; nor could he have diſpoſed of it without her being Examined in Chancery, or by joining with her in a Fine; and if he could not diſpoſe of the Term it ſelf, or any part thereof by himſelf, the Rent here reſerved ſhall not go to his Executors upon the mere Reſervation; But if the Covenant had been to pay him and his Executors and Adminiſtrators the Rent, perhaps he might have it upon the Contract, tho' not as a Rent.

FINIS.

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